

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1967

No. 733

PERMA LIFE MUFFLERS, INC.
PERMA LIFE MUFFLERS OF ARLINGTON, INC.
PERMA LIFE MUFFLERS OF PRINCE GEORGES COUNTY, INC.
PERMA LIFE MUFFLER SHOPS OF ALEXANDRIA, VA., INC.
ROBIN HOOD OF GRAND RAPIDS, INC.
ROBIN HOOD OF MUSKEGON, INC.
REGINA M. ROSS, Assignee of MAXWELL E. ROSS, t/a
ROBIN HOOD MUFFLER SHOP
REGINA M. ROSS, Assignee of MAXWELL E. ROSS, formerly t/a
MIDAS MUFFLER SHOP OF BATTLE CREEK
CLAUDE WHEELER, t/a ROBIN HOOD MUFFLER SHOPS
PIERCE MUFFLER SHOPS, INC.

PETITIONERS

v.

INTERNATIONAL PARTS CORPORATION
MIDAS, INC.
POWELL MUFFLER CO., INC.
MUFFLER CORPORATION OF AMERICA
NATHAN SHERMAN, GORDON SHERMAN, ROBERT SCHROEDER,
ROBERT M. JACOB, HAROLD KRIEGER, IRWIN LISS

RESPONDENTS

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT*

FILED OCTOBER 17, 1967
CERTIORARI GRANTED JANUARY 15, 1968

(i)

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*ON CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

NO. 15862

PERMA LIFE MUFFLERS, INC.; PERMA LIFE MUFFLERS OF ARLINGTON, INC.; PERMA LIFE MUFFLERS OF PRINCE GEORGES COUNTY, INC.; PERMA LIFE MUFFLER SHOPS OF ALEXANDRIA, VA.; ROBIN HOOD OF GRAND RAPIDS, INC.; ROBIN HOOD OF MUSKEGON, INC.; REGINA M. ROSS, Assignee of MAXWELL E. ROSS t/a ROBIN HOOD MUFFLER SHOP; REGINA M. ROSS, Assignee of MAXWELL E. ROSS, formerly t/a MIDAS MUFFLER CLINIC OF MINNEAPOLIS; REGINA M. ROSS, Assignee of MAXWELL E. ROSS, formerly t/a MIDAS MUFFLER SHOP OF BATTLE CREEK; CLAUDE WHEELER, t/a ROBIN HOOD MUFFLER SHOPS and PIERCE MUFFLER SHOPS, INC.,

Plaintiffs-Appellants,

vs.

INTERNATIONAL PARTS CORPORATION; MIDAS, INC.; POWELL MUFFLER CO., INC.; MUFFLER CORPORATION OF AMERICA; NATHAN SHERMAN, GORDON SHERMAN, ROBERT SCHROEDER, ROBERT M. JACOB, HAROLD KRIRGER, and IRWIN LISS,

Defendants-Appellees.

Appeal from the
United States
District Court
for the Northern
District of Illinois,
Eastern Division.

Honorable

Abraham L. Marovitz,
Judge Presiding.

DISTRICT COURT

DOCKET ENTRIES APPLICABLE TO APPEAL

1960

Oct. 19 Complaint filed (R 8-36)

1961

Feb. 8 Order amending paragraphs 16(G) and 41(G) of complaint (R 39-40)

Mar. 3 Answers of defendants filed (R 41-86)

Apr. 17-18 Deposition of Gordon Sherman taken by plaintiffs (240 pages)

May 16-17 Deposition of Gordon Sherman taken by plaintiffs (180 pages)

May 18 Deposition of Robert T. Schroeder taken by plaintiffs (99 pages)

June 16 Defendants filed motion to dismiss paragraphs 21, 24-28 and 31 of complaint (R 116-21)

Aug. 28-29 Deposition of Robert Jacob taken by plaintiffs (213 pages)

Aug. 30-31 Deposition of Harold B. Krieger taken by plaintiffs (186 pages)

Sept. 1 Deposition of Lou Gurnick taken by plaintiffs (118 pages)

Nov. 9 Plaintiffs filed amendments to complaint (R 153-58)

Nov. 20 Defendants filed motion to strike or dismiss plaintiffs' amendments to complaint (R 162-64)

Dec. 18 Order that plaintiffs amend certain paragraphs of complaint and that Count 4 is stricken (R 226-28)

1962

Jan. 17 Plaintiff, B. Paul Morris, t/a Morris Muffler Shop, voluntarily dismissed complaint R (234-35)

Jan. 17 Plaintiffs filed amendments to complaint (R 229-33)

Jan. 29 Amendments to answers of defendants filed (R 236-41)

June 25-28 Deposition of Maxwell E. Ross taken by defendants (434 pages)

July 16-19 Deposition of Gregory T. Skarupa taken by defendants (323 pages)

Aug. 27-29 Deposition of Claude D. Wheeler taken by defendants (264 pages)

Sept. 24-27 Deposition of Joseph Pierce taken by defendants (355 pages)

Oct. 3 Plaintiffs served interrogatories upon defendants (R 242-58)

Nov. 12-15 Supplemental depositions of Ross, Skarupa, Wheeler and Pierce taken by defendants (229 pages)

Dec. 18 Defendants filed answers to certain of plaintiffs' interrogatories (R 288-308)

1963

June 17 Defendants filed amended answer to plaintiffs' interrogatory 27 (R 325-29)

Sept. 26 Cause transferred to calendar of Judge Marovitz

1964

Feb. 11 Defendants filed interrogatories to all plaintiffs and interrogatories to each plaintiff (R 330-94)

Dec. 3 Defendants filed additional answer to plaintiffs' interrogatories (R 429-45)

Dec. 11 Plaintiff Skarupa filed answers to defendants' interrogatories. (R 446-556)

1965

Feb. 15 Plaintiffs Pierce, Wheeler, Skarupa and Ross filed answers to defendants' interrogatories (R 577-1031)

Feb. 15 Defendants filed answers to certain of plaintiffs' interrogatories (R 1032-52)

June 30 Order that all discovery and pleadings be completed by Aug. 6, 1965. (R 1053)

July 29-30 Plaintiffs Wheeler, Pierce and Ross filed additional answers to defendants' interrogatories. (R 1064-1113)

Aug. 2 Defendants filed motions for production of documents and to compel further answers to interrogatories and alternative motions for preclusion of evidence. (R 1114-28)

Aug. 6 Pretrial conference held; order that plaintiffs produce documents and further answer interrogatories and that defendants file motion for summary judgment by Oct. 18, 1965. (R. 1129-31)

- Aug. 17 Plaintiffs filed supplemental answers to defendants' interrogatories (R 1132-39)
- Oct. 18 Defendants filed motion for summary judgment with supporting brief, affidavit and appendix (R 1140-1233)
- Dec. 6 Plaintiffs filed opposition to motion for summary judgment (R 1234-1312)

1966

- Jan. 5 Plaintiffs filed motion to strike paragraphs 1(b) and 3 of defendants' motion for summary judgment (R 1343-54)
- Feb. 25 Memorandum opinion on defendants' motion for summary judgment and plaintiffs' motion to strike (R 1401-12)
- Mar. 2 Order granting summary judgment and final judgment of dismissal on Counts 1 and 2 and denying summary judgment on Count 3 without prejudice to renew said motion after defendants further answer plaintiffs' interrogatories. (R 1414-16)
- Mar. 10 Defendants filed answer to plaintiffs' interrogatory 34 (R 1417-21)
- Mar. 11 Defendants filed renewed motion for summary judgment (R 1422-25)
- Mar. 31 Plaintiffs filed opposition to defendants' renewed motion for summary judgment (R 1433-52)
- May 20 Memorandum opinion on defendants' renewed motion for summary judgment (R 1494-1501)

- May 24 Order granting summary judgment and final judgment of dismissal on Count 3 (R 1502-03)
- June 17 Plaintiffs filed notice of appeal (R 1504-06)
- June 24 Plaintiffs filed amended notice of appeal (R 1508-10)
- Sept. 15 Record of District Court transmitted to Court of Appeals.

10 COMPLAINT UNDER THE SHERMAN AND CLAYTON ACTS FOR TREBLE DAMAGES AND FOR OTHER RELIEF¹

The plaintiffs above named bring this cause of action against the defendants above named, and complain and allege as follows:

JURISDICTION AND VENUE

1. Jurisdiction is conferred on this Court by Section 4 of the Act of Congress of October 15, 1914, entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies and For Other Purposes," as amended and supplemented (15 U.S.C. 15), said Act being commonly and sometimes hereinafter referred to as the Clayton Act, and by Section 1337 of Title 28 of the United States Code, for alleged violations of Section 1 of the Act of Congress of July 2, 1890, as amended and supplemented, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" (15 U.S.C. 1), said Act being commonly and sometimes hereinafter referred to

¹ The Complaint, as finally amended, is set forth hereafter. Those portions of the original Complaint or amendments thereto which were deleted or subsequently amended by plaintiffs have not been included in this Appendix.

as the Sherman Act, and Sections 2 and 3 of the Clayton Act, aforesaid (15 U.S.C. 13, 14).

(Amendment filed Jan. 17, 1962)

229 Paragraph 1 of the complaint is amended by adding to that paragraph the following additional paragraphs:

"1A. Diversity of citizenship exists as between all of the Plaintiffs and all of the Defendants in that: Plaintiffs PERMA LIFE MUFFLERS, INC. is a corporation organized under the laws of the State of Maryland and having its principal office in the State of Maryland; Plaintiff PERMA LIFE MUFFLERS OF ARLINGTON, INC. is a corporation organized under the laws of the State of Virginia and having its principal place of business in the State of Virginia; Plaintiff PERMA LIFE MUFFLERS OF PRINCE GEORGES COUNTY, INC. is a corporation organized under the laws of the State of Maryland and having its principal place of business in the State of Maryland; Plaintiff PERMA LIFE MUFFLER SHOPS OF ALEXANDRIA, VA., INC. is a corporation organized under the laws of the State of Virginia and having its principal place of business in the State of Virginia; Plaintiff ROBIN HOOD OF GRAND RAPIDS, INC. is a corporation organized under the laws of the State of Michigan and having its principal place of business in the State of Michigan; Plaintiff ROBIN HOOD OF MUSKEGON, INC. is a corporation organized under the laws of the State of Michigan and having its principal place of business in the State of Michigan; Plaintiff REGINA M. ROSS is a citizen of the State of Michigan; Plaintiff CLAUDE WHEELER is a citizen of the State of Missouri; Plaintiff B. PAUL MORRIS is a citizen of the State

of North Carolina; and Plaintiff PIERCE MUFFLER SHOPS, INC. is a corporation organized under the laws of the State of New York and having its principal place of business in the State of New York; whereas Defendants INTERNATIONAL PARTS CORPORATION, MIDAS, INC., POWELL MUFFLER CO., INC., MUFFLER CORPORATION OF AMERICA, NATHAN SHERMAN, GORDON SHERMAN, ROBERT SCHROEDER, ROBERT M. JACOB, HAROLD KRIEGER, and IRWIN LISS are citizens of the State of Illinois or corporations organized under the laws of the State of Illinois and having their principal place of business in the State of Illinois.

"1B. The amount of each Plaintiff's claim under Count Four hereof (Paragraph 21A), exclusive of interests and costs, exceeds the sum of \$10,000.00."

(Original complaint continued)

10 2. Each of the defendants transacts business within the Northern District of Illinois and/or may be found herein, and the venue of this Court is thereby duly established.

DEFINITIONS

3. Whenever the term "automotive exhaust parts" is used herein, the term refers to some or all of the following: mufflers, true-tone mufflers, farm-tractor mufflers, tail pipes, tail-pipe elbows, straight tail-pipe tubing, flexible metal

11 tubing, tail-pipe slip connectors, exhaust pipes, tail-pipe hangers, adjustable pipe hangers, rubber shim assortments, saddle-type muffler clamps, full-circle muffler clamps, special-type muffler clamps, muffler hangers, muffler straps, muffler support straps, tail-pipe straps, muffler-reducing bushings, exhaust-pipe flange gaskets, exhaust-

flange gasket assortments, muffler and tail-pipe tools, cap screws, self-tapping screws, hexagon nuts, flat washers, lock washers, manifold brass nuts, manifold studs, stud and nut assortment, tail-pipe tips, exhaust extensions, dual-exhaust kits, and dual-installation kits.

4. Whenever the term "allied automobile products" is used herein, the term refers to automotive replacement parts other than automotive exhaust parts as defined herein, including but not limited to springs, shock absorbers, windshields, batteries, tires, oil filters, seat covers, and convertible tops.

5. Whenever the term "exclusive agreement(s)" or "standard-form exclusive agreement(s)" is used herein, said term refers to a contract and/or several of such contracts entitled "License and Sales Agreement(s)" between a plaintiff and/or plaintiffs herein, and/or others, and the defendant MIDAS, INC. All of such contracts were in force and/or effective during some part or all of the period November 22, 1955 to and including March 31, 1960. A copy of one form of this Exclusive Agreement is attached hereto and made a part hereof as "Exhibit A."

6. Whenever the term "contractee" is used herein, said term refers to the party to an exclusive agreement as defined herein other than the defendant MIDAS, INC.

7. The term "and/or" means "and" and, in the alternative, "or."

8. Acts alleged in this complaint to have been done by any corporate defendant(s) were authorized, ordered, and/or performed by officers, agents, servants, or employees of such corporate defendant(s).

12 DESCRIPTION OF THE DEFENDANTS

9. Each of the following individuals, firms, and/or corporations are made defendants herein and have businesses and/or may be found at the addresses set forth below:

Defendant and Address

- (A) INTERNATIONAL PARTS CORPORATION [hereinafter "INTERNATIONAL"], an Illinois Corporation; 4101 West 42nd Place, Chicago, Illinois;
- (B) MIDAS, INC. [hereinafter "MIDAS"], an Illinois corporation; 4101 West 42nd Place, Chicago, Illinois;
- (C) POWELL MUFFLER CO., INC. [hereinafter "POWELL"], 42 West 42nd Place, Chicago, Illinois;
- (D) MUFFLER CORPORATION OF AMERICA [hereinafter "MCA"], an Illinois corporation; 2501 West 24th Street, Chicago, Illinois;
- (E) NATHAN SHERMAN, an individual; 4101 West 42nd Place, Chicago, Illinois;
- (F) GORDON SHERMAN, an individual; 4101 West 42nd Place, Chicago, Illinois;
- (G) ROBERT SCHROEDER, an individual; 4101 West 42nd Place, Chicago, Illinois;
- (H) ROBERT M. JACOB, an individual; 4101 West 42nd Place, Chicago, Illinois;
- (I) HAROLD KRIEGER, an individual; 4101 West 42nd Place, Chicago, Illinois;

(J) IRWIN LISS, an individual; 4101 West 42nd Place, Chicago, Illinois.

(Amendment filed on Aug. 13, 1965)

1130 Upon stipulation and agreement of counsel for all parties that subsequent to the filing of this action all of the corporate party defendants, pursuant to a plan of reorganization adopted by defendant International Parts Corporation, an Illinois corporation, and certain other corporations and individuals, were merged into or acquired by defendant International Parts Corporation, a Delaware corporation, and that subsequent to that merger International Parts Corporation, a Delaware corporation, by charter amendment changed its name to Midas-International Corporation, a Delaware corporation, that said Midas-International Corporation is hereby named as a party defendant in this action.

(Original complaint continued)

10. Each of the corporate defendants is engaged in the business of manufacturing for sale and/or purchasing for resale at wholesale automotive exhaust parts and/or allied automobile products, and each of the individual defendants is an officer and/or employee and/or agent of one or more of the corporate defendants herein.

11. On information and belief, plaintiffs aver that each of the defendants MIDAS, POWELL, and MCA is a wholly-owned subsidiary of the defendant INTER-13 NATIONAL and/or that all of the issued and outstanding stock of these corporations is owned by the defendant INTERNATIONAL and/or officers and/or agents and/or nominees thereof.

12. On information and belief, plaintiffs aver that for the calendar year ending December 31, 1959, the gross

sales of each of the corporate defendants exceeded the sums set forth below:

(a) INTERNATIONAL	\$17,000,000
(b) MIDAS	7,500,000
(c) POWELL	2,000,000
(d) MCA	2,000,000

13. Defendant MIDAS during the periods relevant to this complaint purchased, for resale at wholesale, automotive exhaust parts from the defendants INTERNATIONAL, POWELL, and MCA and from other individuals, firms, and/or corporations unknown which were engaged in business competitively with INTERNATIONAL, POWELL, and MCA. This defendant distributed and sold such automotive exhaust parts exclusively to individuals, firms, and/or corporations, including but not limited to the plaintiffs herein, with whom it had entered into a standard-form exclusive agreement as defined herein. By this means the defendant MIDAS distributed and sold automotive exhaust parts on a nationwide basis under more than 250 separate standard-form exclusive agreements to independent contractees, including but not limited to plaintiffs herein, located throughout the United States.

14. During the periods relevant to this complaint, this defendant's standard-form exclusive agreement prohibited each of the plaintiffs herein, and/or any other contractees thereunder, from purchasing, and/or purchasing and selling, and/or selling, and/or handling, and/or servicing any automotive exhaust parts and/or allied automobile products which had not been purchased and/or acquired from the defendant MIDAS; required contractees thereunder to maintain retail prices published by the defendant MIDAS; limited the territory within which contractees thereunder were authorized to engage in business; required

contractees thereunder to devote all of their time to the operation of the business defined by their respective standard-form exclusive agreements; obligated contractees thereunder personally, upon certain specific guarantees which the defendant MIDAS authorized in connection with the sale and installation of its mufflers; and required contractees thereunder to contribute 2 per cent of purchases from the defendant MIDAS for such "national advertising" as defendant MIDAS might in its discretion authorize.

15. Each of the standard-form exclusive agreements referred to herein authorized contractees thereunder to use the word "MIDAS" in connection with the businesses defined by such standard-form exclusive agreements, but the relationship created by each of such standard-form exclusive agreements was, by their express terms, that of seller and buyer, and not principal and agent.

DESCRIPTION OF PLAINTIFFS

16. Each of the following individuals, firms, and/or corporations are plaintiffs herein. Each of these plaintiffs accepted a standard-form exclusive agreement with the defendant MIDAS, and from and as of the date of acceptance, as set forth below, under that exclusive agreement, and/or subsequent exclusive agreements and/or additional exclusive agreements, and until the date and/or dates of termination of such exclusive agreements, also as set forth below, was engaged in the business of selling and installing automotive exhaust parts within the exclusive sales territory and/or territories defined by its exclusive agreement, at the address and/or addresses set forth below and/or at other addresses within said territory and/or territories:

15	<u>Plaintiff and Address</u>	<u>Relevant Period</u>	
		<u>Acceptance</u>	<u>Termination</u>
	(A) Perma Life Mufflers, Inc., a Maryland corporation; 2404 Price Avenue, Wheaton, Md.	Apr. 1956	Feb. 12, 1960
	(B) Perma Life Mufflers of Arlington, Inc., a Virginia corporation; 2115 Wilson Boulevard, Arlington, Va.	Dec. 1956	Feb. 12, 1960
	(C) Perma Life Mufflers of Prince Georges County, Inc., a Maryland corporation; 3606 Bladensburg Rd., Cottage City, Md.	May 1957	Feb. 12, 1960
	(D) Perma Life Muffler Shops of Alexandria, Va., Inc., formerly Midas Muffler Shops of Alexandria, Va., Inc., a Virginia corporation; 1912 Duke Street, Alexandria, Va.	Mar. 1958	Feb. 12, 1960
	(E) Robin Hood of Grand Rapids, Inc., formerly Midas of Grand Rapids, Inc., a Michigan corpora- tion; 726 Division Street, Grand Rapids, Mich.	Apr. 1956	Dec. 22, 1959
5	(F) Robin Hood of Muskegon, Inc., formerly Midas of Muskegon, Inc.; a Michigan corporation; 2107 Henry Street, Muskegon, Mich.	Jan. 1956	Dec. 22, 1959

<u>Plaintiff and Address</u>	<u>Relevant Period</u>	
	<u>Acceptance</u>	<u>Termination</u>
<i>(Amendment filed Feb. 8, 1961).²</i>		
3916(G) Regina M. Ross, Assignee of Maxwell E. Ross, t/a Robin Hood Muffler Shop, formerly t/a Midas Muffler Shop, an individual; 4109 South Westledge Avenue, Kalamazoo, Mich.	Apr. 19, 1958	Dec. 22, 1959

(Original complaint continued)

15(H) Regina M. Ross, Assignee of Maxwell E. Ross, formerly t/a Midas Muffler Clinic of Minneapolis, an individual; formerly 1400 Hennipen Avenue, Minneapolis, Minn., and/or 4109 East Lake Street, Minneapolis, Minn.	Nov. 1956	Sept. 3, 1958
16(I) Regina M. Ross, Assignee of Maxwell E. Ross, formerly t/a Midas Muffler Shop of Battle Creek, an individual; formerly 1020 East Columbia Avenue, Battle Creek, Mich.	May 1959	Dec. 22, 1959
(J) Claude Wheeler, t/a Robin Hood Muffler Shops, formerly Midas Muffler Shops, an individual; 1163 South Kingshighway, St. Louis, Mo.; 5335 State Street, East St. Louis, Ill.	Sept. 1956	Nov. 9, 1959

² Original paragraph 16(G) is on page 15 of the Record.

<u>Plaintiff and Address</u>	<u>Relevant Period</u>	
	<u>Acceptance</u>	<u>Termination</u>
(K) B. Paul Morris, t/a Morris Muffler Shop, formerly t/a Midas Muffler Shop, an individual; 515 English Street, High Point, N. C.	Apr. 1957	Mar. 31, 1960
(L) B. Paul Morris, t/a Morris Muffler Shop, formerly t/a Midas Muffler Shop, an individual; 224 Commerce Place, Greensboro, N. C.	Sept. 1957	Mar. 31, 1960
(M) Pierce Muffler Shops, Inc., formerly Midas Muffler Sales & Service, Inc., a New York corporation; 1205 Erie Boulevard East, Syracuse, N. Y.; 511 South State Street, Syracuse, N. Y.; 1205 Oriskany Street West, Utica, N. Y.; 48 State Street, Binghamton, N. Y.; 135 Erie Boulevard West, Rome, N. Y.; 261 Baldwin Street, Elmira, N. Y.	Apr. 1956	Nov. 31, 1959 (sic)

17. During the periods relevant to this complaint sales of automotive exhaust parts by each of the plaintiffs herein within the exclusive sales territory and/or territories defined by their respective standard-form exclusive agreements constituted a substantial volume of the total sales of automotive exhaust parts within said territory and/or territories.

17 18. Following termination of their respective standard-form exclusive agreements as set forth hereinabove, each of the plaintiffs continued to be engaged and, as of the date hereof, each is presently engaged (excepting plaintiff REGINA M. ROSS, Assignee of MAXWELL E. ROSS, formerly t/a MIDAS MUFFLER CLINIC OF MINNEAPOLIS and MIDAS MUFFLER SHOP OF BATTLE CREEK) in the business of selling and installing automotive exhaust parts, and each of such plaintiffs has since the date of its termination, as set forth hereinabove, expanded the scope of its business to include the sale and installation of allied automobile products as defined herein. In the course of their respective businesses, since the date of their respective terminations as set forth hereinabove, each of the plaintiffs (except REGINA M. ROSS as set forth above) has purchased and continues to purchase for resale and installation automotive exhaust parts and allied automobile products from numerous sources of supply located both within and without the respective states within which each of such plaintiffs herein does business.

COUNT ONE

19. During the period beginning about January 1, 1955, to and including the date hereof, the defendants and other co-conspirators unknown violated Section 1 of the Sherman Act (15 U.S.C. 1) in that they have combined together, and/or agreed, and/or contracted, and/or planned, and/or conspired to unlawfully restrain and substantially lessen competition in the sale of automotive exhaust parts and allied automobile products as hereinbefore defined in interstate commerce, and in that they combined together, and/or agreed, and/or contracted, and/or planned, and/or conspired unlawfully to fix and maintain prices of automotive exhaust parts and to create and/or induce a commercial

boycott and/or boycotts, the effects of which were to unlawfully restrain and substantially lessen competition in the sale of automotive exhaust parts and allied automobile products as hereinbefore defined in interstate commerce.

18

COUNT TWO

20. During the period beginning about January 1, 1955, up to and including the date hereof, the defendants, including but not limited to the defendant MIDAS, violated Section 3 of the Clayton Act (15 U.S.C. 14) in that they contracted for the sale of, and sold, mufflers and/or other parts of automotive exhaust systems for use, consumption, and resale within the United States and/or the District of Columbia, and/or fixed the prices thereof, upon the condition, agreement, and understanding that purchasers of such mufflers and/or other parts of automotive exhaust systems, including but not limited to the plaintiffs herein, would not use or deal in mufflers and/or other parts of automotive exhaust systems and/or the products and/or merchandise manufactured and/or sold by individuals, firms, and/or corporations other than the defendants herein, and the effect of such contracts of sale, and sale, on such conditions, agreements, and understandings was to substantially lessen competition and/or tend to create a monopoly in the sale and/or sale for resale of mufflers, and/or parts of automotive exhaust systems, and/or allied automobile parts.

COUNT THREE

(Amendment filed Nov. 9, 1961)

153 Paragraph 21 is deleted in its entirety and the following is substituted therefor and in lieu thereof:³

³ Original paragraph 21 is on page 18 of the Record.

"21. During the period beginning about January 1, 1955, up to and including March 31, 1960, defendants, including but not limited to MIDAS, violated Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13), in that they granted discriminations in prices and services prohibited by Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13) in connection with the sale in interstate commerce of automotive exhaust parts of like grade and quality to certain of their customers without offering, or otherwise making those same or similar services available to plaintiffs herein
154 in connection with their purchase in commerce of the same, or similar, automotive exhaust parts from the defendants including defendant MIDAS.

(Original complaint continued)

19 SPECIFIC EXAMPLES OF ILLEGAL ACTS

22. The defendants and co-conspirators unknown, pursuant to agreement, plan, combination and/or conspiracy and by other divers means, methods, and acts sought to accomplish, and accomplished, the illegal ends described herein; among such divers means, methods and acts were the following:

(A) Beginning on or about January 1, 1955, the defendants INTERNATIONAL, POWELL, and MCA, together and/or each with the other, sought to promote, promoted, planned, sought to establish, and with the defendant MIDAS subsequently established, an illegal boycott and/or boycotts in that (a) they jointly agreed upon and selected those persons, firms and corporations who would be offered, and allowed to accept, exclusive agreements with the defendant MIDAS, and thereafter defendant MIDAS and/or

boycott and/or boycotts, the effects of which were to unlawfully restrain and substantially lessen competition in the sale of automotive exhaust parts and allied automobile products as hereinbefore defined in interstate commerce.

18

COUNT TWO

20. During the period beginning about January 1, 1955, up to and including the date hereof, the defendants, including but not limited to the defendant MIDAS, violated Section 3 of the Clayton Act (15 U.S.C. 14) in that they contracted for the sale of, and sold, mufflers and/or other parts of automotive exhaust systems for use, consumption, and resale within the United States and/or the District of Columbia, and/or fixed the prices thereof, upon the condition, agreement, and understanding that purchasers of such mufflers and/or other parts of automotive exhaust systems, including but not limited to the plaintiffs herein, would not use or deal in mufflers and/or other parts of automotive exhaust systems and/or the products and/or merchandise manufactured and/or sold by individuals, firms, and/or corporations other than the defendants herein, and the effect of such contracts of sale, and sale, on such conditions, agreements, and understandings was to substantially lessen competition and/or tend to create a monopoly in the sale and/or sale for resale of mufflers, and/or parts of automotive exhaust systems, and/or allied automobile parts.

COUNT THREE

(Amendment filed Nov. 9, 1961)

153. Paragraph 21 is deleted in its entirety and the following is substituted therefor and in lieu thereof:³

³ Original paragraph 21 is on page 18 of the Record.

"21. During the period beginning about January 1, 1955, up to and including March 31, 1960, defendants, including but not limited to MIDAS, violated Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13), in that they granted discriminations in prices and services prohibited by Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13) in connection with the sale in interstate commerce of automotive exhaust parts of like grade and quality to certain of their customers without offering, or otherwise making those same or similar services available to plaintiffs herein 154 in connection with their purchase in commerce of the same, or similar, automotive exhaust parts from the defendants including defendant MIDAS.

(Original complaint continued)

19 SPECIFIC EXAMPLES OF ILLEGAL ACTS

22. The defendants and co-conspirators unknown, pursuant to agreement, plan, combination and/or conspiracy and by other divers means, methods, and acts sought to accomplish, and accomplished, the illegal ends described herein; among such divers means, methods and acts were the following:

(A) Beginning on or about January 1, 1955, the defendants INTERNATIONAL, POWELL, and MCA, together and/or each with the other, sought to promote, promoted, planned, sought to establish, and with the defendant MIDAS subsequently established, an illegal boycott and/or boycotts in that (a) they jointly agreed upon and selected those persons, firms and corporations who would be offered, and allowed to accept, exclusive agreements with the defendant MIDAS, and thereafter defendant MIDAS and/or

other of the corporate defendants boycotted those who were not so selected; (b) they jointly agreed upon those persons, firms, and corporations who would be allowed to continue to be engaged in business pursuant to exclusive agreements with the defendant MIDAS, and thereafter defendant MIDAS and/or other of the corporate defendants boycotted those persons, firms, and corporations whose exclusive agreements were terminated; and (c) caused all MIDAS contractees, including the plaintiffs herein, as a condition of the handling of MIDAS products, to agree to boycott all other suppliers of automotive exhaust parts as well as suppliers of allied automobile products.

(B) To achieve their unlawful objectives, INTERNATIONAL, POWELL, and MCA organized, and/or had organized at their direction, an Illinois corporation whose official name was MIDAS, INC., which corporation is named as a defendant herein, and/or acquired, either directly or indirectly through agents and/or nominees, all of the issued and outstanding stock of such corporation to which the defendant INTERNATIONAL transferred and/or otherwise assigned all of its right, title, and interest in and to the name MIDAS.

20 (C) INTERNATIONAL, POWELL, and MCA, one with the other, and each with the defendant MIDAS, INC., agreed, planned, combined and/or conspired to establish a nationwide system of independent contractors dealing exclusively in automotive exhaust parts manufactured, and/or manufactured and sold, and/or sold to them by the defendant MIDAS.

(D) To achieve their unlawful objectives, the defendants, and each of them, agreed, planned, combined, and/or conspired concerning the terms of a standard-form exclusive

agreement under which the defendant MIDAS would authorize independent contractors to operate.

(E) Pursuant to such agreement, plan, combination, and/or conspiracy, the defendants promulgated a standard-form exclusive agreement entitled "License and Sales Agreement," which the defendant MIDAS adopted, authorized, and commenced using in interstate commerce.

(F) The standard-form exclusive agreement adopted by the defendant MIDAS pursuant to its agreement, plan, combination, and/or conspiracy with INTERNATIONAL, POWELL, and MCA, and other of the defendants named herein as well as others unknown, prohibited contractees thereunder from purchasing, and/or purchasing competitively, and/or selling, and/or selling competitively any automotive exhaust parts which had not been manufactured and/or sold to such contractees by the defendant MIDAS; prohibited contractees thereunder from purchasing, and/or purchasing competitively, and/or selling, and/or selling competitively any allied automobile products; required contractees thereunder to maintain prices published by the defendant MIDAS; limited the territory and/or territories within which contractees thereunder were authorized to engage in business; required contractees thereunder to devote all of their time to the operation of the business defined by their respective exclusive agreements; obligated contractees thereunder personally upon certain specific
 21 guarantees on mufflers which the defendant MIDAS authorized; and required contractees thereunder to contribute 2% of purchases from MIDAS for national advertising which the defendant MIDAS might in its discretion authorize.

(G) Pursuant to the agreement, plan, combination, and/or conspiracy aforesaid, defendant MIDAS entered into

numerous contracts with individuals, firms, and corporations located throughout the United States. On information and belief plaintiffs allege during the period beginning January 1, 1956, and ending March 31, 1960, the defendant MIDAS, INC. entered into more than 250 such contracts, herein referred to as exclusive agreements, with more than 75 separate individuals, firms, and/or corporations who were engaged in business in more than 25 different states of the United States. Among the individuals, firms, and corporations with whom the defendant MIDAS contracted were the plaintiffs herein. Except as otherwise alleged herein, all such contracts were in writing and fully executed by the parties thereto. Defendants, up to and including the date hereof, have continued to maintain their nationwide system of retail outlets operating under exclusive agreements.

(H) Certain of the individuals, firms and/or corporations with whom the defendant MIDAS entered into exclusive agreements were, prior to such exclusive agreements, authorized by the defendant INTERNATIONAL to purchase and/or sell automotive exhaust parts and allied automobile products manufactured and/or sold by the defendant INTERNATIONAL. For example, plaintiff PERMA LIFE MUFFLERS, INC. was, prior to April of 1956, an authorized dealer of the defendant INTERNATIONAL.

(I) The defendants, and each of them, agreed, planned, and/or conspired, each with the other, concerning the firms, individuals, and/or corporations with whom the defendant MIDAS would enter into standard-form exclusive agreements.

22 (J) Each of the standard-form exclusive agreements between the plaintiffs and/or any of them and the

defendant MIDAS, which were identical to the standard form exclusive agreements which the defendants MIDAS entered into with other persons, firms, and/or corporations located throughout the United States, provided in pertinent part as follows: (a) that the relationship between the plaintiffs and each of them and the defendant MIDAS was that of seller and buyer, and not principal and agent; (b) that plaintiffs and each of them were authorized to use the name MIDAS and to sell and install automotive exhaust parts exclusively within but not without the specific territory and/or territories defined by their respective exclusive agreements; (c) that plaintiffs and each of them would not, without the written consent of the defendant MIDAS, sell, install, and/or service any products other than those purchased from the defendant MIDAS; (d) that plaintiffs and each of them would purchase automotive exhaust parts from the defendant MIDAS at the same price and/or prices at which other MIDAS contractees purchased automotive exhaust parts from the defendant MIDAS; (e) that plaintiffs and each of them would maintain the retail sales price published by the defendant MIDAS on all products which they sold; (f) that plaintiffs and each of them would not engage in any business or employment other than that as defined by their exclusive agreements, and would devote all of their time to the operation of the business and/or businesses defined by their respective exclusive agreements; (g) that the defendant MIDAS would replace and/or adjust with plaintiffs and each of them any merchandise within the limits of the specific guarantees which the defendant MIDAS authorized; and (h) that plaintiffs and each of them would pay the defendant MIDAS a surcharge of 2% of the total amounts of their respective purchases, which amounts the defendant MIDAS was authorized to set aside and utilize for national advertising in its discretion.

23 (K) In the course of their business operations and within the terms of their exclusive agreements, plaintiffs, or some of them, repeatedly requested permission and/or consent of the defendant MIDAS to purchase, and/or sell, and/or service automotive exhaust parts and/or allied automobile products from and/or of sources of supply other than the defendant MIDAS, but such requests for permission and/or consent were consistently denied. Had plaintiffs, or any of them, received permission and/or consent as requested, they would have purchased automotive exhaust parts and allied automobile products from numerous sources of supply located throughout the several states of the United States.

(L) On numerous occasions plaintiffs, or some of them, were approached by representatives of firms engaged in the sale of automotive exhaust parts and/or allied automobile products who offered to sell automotive exhaust parts and/or allied automobile products to plaintiffs, or some of them. In many such instances the prices at which such automotive exhaust parts were offered to plaintiffs, or each of them, were generally substantially lower than the prices at which the plaintiffs, and each of them, purchased similar and/or identical automotive exhaust parts from the defendant MIDAS. Plaintiffs, or some of them, refrained from accepting such offers of sale because of the restrictions imposed upon their purchasing, and/or selling, and/or servicing by their exclusive agreements with the defendant MIDAS, and because of the consistent refusal of the defendant MIDAS to grant permission and/or give its consent to plaintiffs and/or any of them to sell, and/or service, and/or purchase automotive exhaust parts and/or allied automobile parts, other than as defined by their respective exclusive agreements.

(M) In the course of their business operations, plaintiffs, or some of them, repeatedly requested permission and/or consent of the defendant MIDAS to expand the area of their business operations beyond those defined by their exclusive agreements and/or to increase the number of retail outlets which they operated within the territory defined by their respective exclusive agreements, but such requests were consistently denied.

(N) In the course of their business operations, plaintiffs were consistently required by the defendant MIDAS to purchase, and/or sell, and/or service the full line of automotive exhaust parts offered to each of them by such defendant. On numerous occasions plaintiffs, or some of them, requested permission to carry a partial line of automotive exhaust parts offered by this defendant, but on the occasion of each such request, each of such plaintiffs was advised by the defendant MIDAS, and/or its officers, and/or agents, that it would have to purchase, and/or sell, and/or service its full line of automotive exhaust parts.

(O) To enforce the terms of its exclusive agreement with plaintiffs, and each of them, and to accomplish the unlawful ends of the agreement, plan, combination, and/or conspiracy of the defendants as alleged herein, the defendant MIDAS threatened to terminate the exclusive agreement and/or agreements of any of its contractees, including plaintiffs herein, in the event they purchased, and/or sold, and/or serviced automotive exhaust parts from and/or of sources of supply other than the defendant MIDAS, and/or in the event they purchased, and/or sold, and/or serviced allied automobile products. For example, certain of the plaintiffs herein purchased automotive exhaust parts from sources of supply other than defendant MIDAS during periods when such parts were not reasonably available from the defendant MIDAS (and when such parts were reasonably necessary to the continued successful operation of such plain-

tiffs' businesses). These plaintiffs were advised by defendant MIDAS that unless they desisted from such practices their exclusive agreement and/or agreements with the defendant MIDAS would be terminated. In another instance, the defendant MIDAS in fact terminated the exclusive agreement and/or agreements of one of its contractees and/or one of the plaintiffs herein where such contractee and/or plaintiff had purchased and/or sold automotive exhaust parts and allied automobile products from and/or of sources of supply other than the defendant MIDAS. In still another instance, the defendant MIDAS required one of the plaintiffs herein to terminate its established business of selling and installing an allied automobile product, thus requiring this plaintiff to conform to its standard-form exclusive agreement that it would not deal in products other than those purchased from the defendant MIDAS.

23. Beginning in or about January, 1955, the defendants INTERNATIONAL, POWELL, and MCA together, and each with the other, sought to establish, and with the defendant MIDAS subsequently established, through the device of the standard-form exclusive agreement, an unlawful conspiracy, agreement, plan, and/or combination, to fix and/or maintain the prices of automotive exhaust parts.

(Amendment filed Jan. 17, 1961)

230 Paragraphs 24 through 28 inclusive are hereby deleted and the following are substituted therefor and in lieu thereof:⁴

⁴ Original paragraphs 24-28 are on pages 25-27 of the Record and the first amendment to these paragraphs is on pages 154-156 of the Record. Paragraphs 24 and 26, as set forth on pages 49-50 of Appellants' Appendix, were stricken on December 18, 1961 (R 226-28), and the following second amendment to these paragraphs was filed on Jan. 17, 1961.

"24. The defendant MIDAS sold automotive exhaust parts in interstate commerce to some of its contractees, who competed with plaintiffs herein, giving discounts upon the purchase price therefor, which discounts were not offered, or otherwise made available, to plaintiffs herein in connection with their purchase of the same, or similar automotive exhaust parts and/or automotive exhaust parts of like grade and quality, and the defendant thereby discriminated between some of its contractees and the plaintiffs herein in the prices at which it offered and sold automotive exhaust parts.

"24A. The defendant MIDAS sold automotive exhaust parts in interstate commerce to some of its contractees, giving discounts upon the purchase price therefor, which discounts were not offered or otherwise made available to plaintiffs herein, in connection with their purchase of the same or similar automotive exhaust parts and/or automotive exhaust parts of like grade and quality, and this defendant thereby discriminated between certain of its contractees and the plaintiffs herein in the prices at which it offered and sold automotive exhaust parts.

"25. The defendant MIDAS sold automotive exhaust parts in interstate commerce to some of its contractees, some of whom competed with plaintiffs herein, giving services thereon and/or therewith and/or 'guarantee credit' thereon or therewith under certain enumerated circumstances, which services and/or credit it did not offer and/or otherwise make available to the plaintiffs herein, in connection with their purchase of the same or similar automotive exhaust parts and/or automotive exhaust parts of like grade and quality, and the defendant MIDAS thereby indirectly discrim-

inated between certain of its contractees and the plaintiffs herein in the prices at which it offered and sold automotive exhaust parts. For example, the defendant MIDAS granted 100% credit to certain of its contractees on returned automotive mufflers under its guarantee program, while denying 100% credit on returned automotive mufflers under its guarantee to plaintiffs herein.

"26. The defendant INTERNATIONAL and the corporate co-defendants, including but not limited to the defendant MIDAS, sold automotive exhaust parts in interstate commerce to some of their customers, some of whom competed with plaintiffs herein, giving discounts upon the purchase price therefor, and/or giving services and/or 'guarantee credit' in connection with the sale of automotive exhaust parts, which discounts and/or services and/or guarantee credit were not offered and/or otherwise made available to plaintiffs herein, in connection with their purchase of automotive exhaust parts of like grade and quality, and defendants, and each of them, thereby discriminated, directly and/or indirectly, between certain of their customers and the plaintiffs herein in the prices at which they offered and sold automotive exhaust parts.

232 "27. Through the device of the exclusive agreement, the defendant INTERNATIONAL and other of the corporate defendants, pursuant to their agreement, contract, plan, and/or conspiracy, sold automotive exhaust parts in interstate commerce to plaintiffs through defendant MIDAS, and at the same time sold the same and/or similar automotive exhaust parts, and/or automotive exhaust parts of like grade and quality, to others who were not bound to maintain prices under

an exclusive agreement as were plaintiffs herein; the defendant INTERNATIONAL allowed, and/or permitted, and/or authorized some of such customers other than the contractees and/or the plaintiffs herein to sell automotive exhaust parts at prices which were generally substantially lower than the prices at which plaintiffs herein were authorized to sell such products, and such customers sold automotive exhaust parts at prices which were generally substantially lower than the prices at which plaintiffs herein sold such products; and competition between these plaintiffs, and each of them, and other customers of the corporate defendants was thereby unlawfully restrained.

"28. Through the device of the exclusive agreement, the defendant INTERNATIONAL and its corporate co-defendants, pursuant to their agreement, plan, combination, and/or conspiracy, sold automotive exhaust parts in interstate commerce to the plaintiffs, and each of them, through the defendant MIDAS, at prices which were substantially higher than the prices at which the defendant INTERNATIONAL and other of the corporate co-defendants sold the same and/or similar automotive exhaust parts, and/or automotive exhaust parts of like grade and quality, to other persons, firms, and corporations engaged in competition with the plaintiffs herein; and competition between plaintiffs and other customers of the corporate co-defendants was thereby unlawfully restrained."

(Original complaint continued)

27. 29. Through the device of the exclusive agreement, the defendant INTERNATIONAL and other of the corporate co-defendants, pursuant to their agreement, plan, combination, and/or conspiracy, sold allied automobile

products to certain of their customers but refused to sell the same allied automobile products to contractees, including but not limited to plaintiffs herein; and competition in the sale of allied automobile products in interstate commerce was thereby unlawfully restrained.

30. Through the device of the exclusive agreement, the defendant INTERNATIONAL and other of the corporate co-defendants, pursuant to their agreement, plan, combination; and/or conspiracy, sold automotive exhaust parts to the plaintiffs for resale within the United States and/or fixed prices thereof on the written condition that the plaintiffs would not use or deal in automotive exhaust parts and/or allied automobile products manufactured and/or sold by persons, firms, and/or corporations other than defendant MIDAS.

(Amendment filed Nov. 9, 1961)

156 Paragraph 31 is deleted in its entirety and the following is substituted therefor and in lieu thereof:⁵

"31. The defendant MIDAS surcharged each of the plaintiffs herein with a 2% advertising payment for which it failed and/or refused to give equivalent value to 157 each of the plaintiffs herein and/or utilize the proceeds of such surcharge for advertising beneficial to some contractees, but not beneficial to plaintiffs herein, and this defendant thereby indirectly discriminated in the price at which it sold automotive exhaust parts of like grade and quality in commerce."

EFFECTS OF ILLEGAL ACTS

28. 32. The effect of the defendants' illegal acts, including but not limited to the conduct aforesaid and other

⁵ Original paragraph 31 is on page 27 of the Record.

acts in furtherance of the conspiracy, was to unreasonably restrain and substantially lessen competition in the purchasing, and/or purchasing competitively, and/or selling, and/or selling competitively of automotive exhaust parts and allied automobile products in competition in interstate commerce.

33. In the absence of the restrictions imposed by the standard-form exclusive agreement aforesaid: (a) plaintiffs, and each of them, would have been able to purchase automotive exhaust parts and allied automobile products from many sources of supply located throughout the several states of the United States; (b) plaintiffs, and each of them, would have been able to purchase automotive exhaust parts at prices substantially lower than the prices at which such parts were in fact purchased by the plaintiffs, and each of them, from the defendant MIDAS; (c) plaintiffs, and each of them, would have been able to offer automotive exhaust parts to the consuming public at prices substantially lower than those at which they in fact did sell such parts to the consuming public; (d) plaintiffs, and each of them, would have been able to sell and install allied automobile products and parts thereof; and (e) plaintiffs, and each of them, would have been able to expand their business operations, both within and without the territory and/or territories defined by their respective exclusive agreements.

34. In the absence of the restrictions imposed upon them by their respective exclusive agreements, plaintiffs, and each of them, would have purchased automotive exhaust parts and allied automobile products from sources of supply other than the defendant MIDAS and would have expanded their business operations, both within and without the territories defined by their respective exclusive agreements.

29 35. In the absence of the restrictions imposed upon them by their respective exclusive agreements, plain-

tiffs, and each of them, would have purchased identical, and/or similar, and/or equal automotive exhaust parts at prices substantially lower than the prices at which they purchased such parts from the defendant MIDAS.

36. The effects of the defendants' illegal acts, including but not limited to the conduct aforesaid, and other acts in furtherance of the conspiracy, were: (a) to prevent plaintiffs herein and other contractees from dealing with persons, firms, and corporations engaged in business competitively with the defendants and to require the plaintiffs herein and other contractees to purchase automotive exhaust parts manufactured and/or sold by persons, firms, and corporations engaged competitively with the defendants, through the defendants rather than from such persons, firms, and corporations directly; (b) to prevent plaintiffs herein and other contractees from purchasing and/or selling and/or servicing allied automobile products; (c) to prevent plaintiffs herein and other contractees from pricing and selling automotive exhaust parts and allied automobile products competitively with other persons engaged in the business of selling and installing automotive exhaust parts and allied automobile products; and (d) to prevent plaintiffs and other contractees from expanding their business operations both within and without the territory and/or territories defined by their respective exclusive agreements.

37. The actual and potential competition of firms engaged in the business of selling automotive exhaust parts and/or allied automobile products in competition with the defendants, and each of them, was unreasonably restrained and substantially lessened.

38. The actual and potential competition between the plaintiffs, and each of them, and others engaged in the business of selling and installing automotive exhaust parts and/or allied automobile products in competition with

plaintiffs, and each of them, was unreasonably restrained and substantially lessened.

30 39. Prices for the sale of automotive exhaust parts were unlawfully maintained, thus restraining competition in interstate commerce.

PUBLIC INJURY

40. Both the public at large and the consuming public in the marketing territories wherein the plaintiffs, and each of them, were engaged in business were adversely affected by each and every illegal act of the defendants as set forth hereinbefore; and such acts unreasonably restrained and substantially lessened competition and the free flow of interstate commerce.

DAMAGE AND IRREPARABLE INJURY TO PLAINTIFFS AND EACH OF THEM

*(Amendment filed Nov. 9, 1961)**

157 Paragraph 41 is deleted in its entirety, and the following is substituted therefor and in lieu thereof:

"41. As a result of the aforesaid illegal acts and conduct of the defendants, the plaintiffs suffered loss and damages in the amounts set forth below:

(A) PERMA LIFE MUFFLERS, INC: \$358,600

(B) PERMA LIFE MUFFLERS OF AR-
LINGTON, INC: 143,000

(C) PERMA LIFE MUFFLERS OF
PRINCE GEORGES COUNTY, INC: 69,300

* Original paragraph 41 is on page 30 of the Record.

- (D) PERMA LIFE MUFFLER SHOPS
OF ALEXANDRIA, VA., INC: 40,700
- (E) ROBIN HOOD OF GRAND RAPIDS,
INC: 174,900
- (F) ROBIN HOOD OF MUSKEGON,
INC: 200,200
- (G) REGINA M. ROSS, Assignee of
MAXWELL E. ROSS, t/a ROBIN
HOOD MUFFLER SHOP, former-
ly t/a MIDAS MUFFLER SHOP
OF KALAMAZOO 53,900
- (H) REGINA M. ROSS, Assignee of
MAXWELL E. ROSS, formerly
t/a MIDAS MUFFLER CLINIC OF
MINNEAPOLIS 50,600
- (I) REGINA M. ROSS, Assignee of
MAXWELL E. ROSS, formerly
t/a MIDAS MUFFLER SHOP OF
BATTLE CREEK: 8,800
- (J) CLAUDE WHEELER, t/a ROBIN
HOOD MUFFLER SHOP: 294,800
- (K) B. PAUL MORRIS, t/a MORRIS
MUFFLER SHOP OF HIGH
POINT, NORTH CAROLINA 56,100
- (L) B. PAUL MORRIS, t/a MORRIS
MUFFLER SHOP OF GREENS-
BORO, NORTH CAROLINA: 52,800
- (M) PIERCE MUFFLER SHOPS, INC. 502,700''

(Original complaint continued)

31

PRAVERS FOR RELIEF

42. WHEREFORE, plaintiffs pray as follows:

(A) That summonses be issued and directed to each of the defendants hereinabove named, commanding them to appear and to answer the allegations contained in this complaint, and to abide by and perform such orders and decrees as the Court may enter in this cause.

(B) That an order be entered, pursuant to Rule 21 of the Civil Rules of this Court, directing that a separate trial be had upon the issue of the substantive liability of the defendants for the acts hereinabove complained of and the issue of the loss and damage to the plaintiffs as a result of the acts complained of, in the event that the substantive liability of the defendants to the plaintiffs is established.

(C) That: (1) the contracts, combinations, agreements, and conspiracies of the defendants, and other co-conspirators unknown, each with the other; and (2) the restraints of interstate trade and commerce; and (3) the exclusive agreements of the defendant MIDAS, Inc.; and (4) the attempts to fix and the fixing of the price of automotive exhaust parts in the marketing territories of plaintiffs and each of them; and (5) the granting of rebates and/or discriminatorily lower prices by defendants, all be declared to have been illegal and violative of the Sherman and Clayton Acts aforesaid.

(D) That the defendants be ordered to pay the plaintiffs treble the amount of loss and damages sustained by the plaintiffs, and each of them.

(E) That this Honorable Court allow to the plaintiffs, and each of them, and that the defendants pay the full cost

of this suit and include as part thereof a reasonable attorneys' fee for the services of plaintiffs' attorneys.

32 (F) That plaintiffs be granted such other and further relief as this Honorable Court shall deem just and proper.

33

EXHIBIT "A"

Registered No.....

MIDAS, INC.

1023 South State Street, Chicago 5, Illinois

LICENSE AND SALES AGREEMENT

AGREEMENT dated between MIDAS, INC., an Illinois corporation, (hereinafter called "Seller") and (hereinafter called "Buyer");

WITNESSETH: Whereas, Seller is the owner of a trade name dominated by the word "MIDAS"; and

Whereas, Seller is the owner of the trademark "MIDAS" for use in connection with mufflers for internal combustion engines and parts thereof, namely, tail pipes, exhaust pipes and muffler clamps, registered in the United States Patent Office as Registration Nos. 620322 and 641711; and

WHEREAS, Seller is also the owner of the service marks and service registrations containing said name "MIDAS"; and

WHEREAS, Seller is engaged in the business of selling at wholesale, mufflers, tail pipes and exhaust pipes and

accessories bearing said trademark "MIDAS", and through advertising, merchandising and selling such products has built up valuable good will on the part of the purchasing public with respect to said products sold by Seller; and

WHEREAS, Buyer desires to obtain the exclusive right to sell such merchandise in the place of business established or to be established by the Buyer at the address shown herein, and of purchasing such merchandise from Seller upon the same terms and conditions as other buyers under contracts in the same form as this contract, for resale at Buyer's store;

NOW, THEREFORE, in consideration of the premises, and of the mutual covenants, agreements, terms and conditions hereinafter set forth, the parties hereby agree as follows:

I. LICENSE

(a) Subject to all of the covenants, terms and conditions hereinafter provided, Seller hereby grants to Buyer, for and during the terms of this agreement, unless sooner terminated, as herein provided, the exclusive right to handle and sell Seller's products as above described, provided said products are purchased by the Buyer from the Seller, at the following location:

.....
 within the following territory:

.....
 (Additional locations will be permitted within this territory only with written consent of Seller).

34 (b) Buyer hereby acknowledges the validity of said trademark, trade name and service marks, and covenants and agrees that he will not in any way do anything to infringe upon the rights of Seller in said trademark, trade name and/or service mark, nor will he use said trademark, trade name or service mark, or any name similar thereto, except in the manner permitted by this contract. Buyer further covenants that he will not use said name and/or marks on any products other than products purchased from Seller containing said trademark, nor will Buyer, without the written consent of Seller, assign his rights under this agreement or the right to use said name or marks or any name and/or marks similar thereto.

(c) In the event of the termination of this agreement, all rights of the Buyer to the use of said name or names and/or marks shall cease, and said rights and all good will appertaining thereto shall revert to Seller. Buyer further covenants that in the event that Buyer shall cause his business to be incorporated, the charter of such corporation shall provide that in the event of a termination of this agreement, said corporation will discontinue the use of the name "Midas" or any variation thereof.

(d) Buyer covenants that all literature, circulars, advertising matter or labels which the Buyer may use in connection with the sale of said products, shall contain said trademark and/or service mark, together with the statutory notice of registration, which must be in one of the following forms: "Registered in U. S. Patent Office" or "Reg. U. S. Pat. Off." or the letter R enclosed within a circle, thus "R". Seller shall have the right to require that all such literature and any and all publicity be first submitted to it for written approval before the same is circulated, published or displayed.

(e) It is understood that Seller reserves the exclusive right to grant similar licenses to other Buyers outside the territory for which Buyer is herein given such exclusive license.

(f) Buyer agrees to fill out and furnish promptly any and all reports required by Seller and to make available to Seller or its representative Buyer's latest financial and operating statements immediately upon request of Seller or its representative.

(g) Buyer agrees to capitalize at \$. in cash.

II. OPERATION OF STORE

(a) Seller grants to Buyer the right, subject to all the other covenants, terms and conditions stated in this agreement, to designate and refer to and operate his store under the name "Midas Muffler Shop,, Sole Proprietor," and Buyer shall have no right to use said name, except during the continuance of this agreement, and such right shall cease immediately upon termination thereof for any reason whatsoever, and in such event, Buyer covenants that he will forthwith discontinue the use of said name, or any name similar thereto, and remove from his store stationery and literature, all signs and designations bearing such name.

(b)^a Buyer covenants and agrees that at all times during the continuance of this agreement he will designate, refer to and operate his store only under the name "Midas Muffler Shop" with the addition of his name as proprietor, without any variation thereof unless with special consent of Seller. However, Buyer agrees that he will not

use said name or any other combination of words, or do any act, or make any statement in such manner which might imply that Buyer's store is an agency or branch of Seller, or that Seller in any manner owns, controls or operates Buyer's business, or is in any manner responsible for Buyer's obligations, or liable for his acts, or that any relationship exists between Seller and Buyer other than that of vendor and purchaser, or that any affiliation or connection exists between the business conducted by Buyer and businesses conducted by other Buyers, who also purchase merchandise from the Seller. Notwithstanding this paragraph (b), Seller shall at all times have control of the nature and quality of the goods sold and of the nature and quality of the services rendered by Buyer pursuant to this agreement.

(c) Buyer covenants and agrees that he will not, during the continuance of this agreement, without Seller's written consent, handle in said store any products other than those purchased from the Seller, or render services except on such products. Buyer further covenants and agrees that he will devote all of his time to the operation of the shop covered by this franchise and that he will not engage in any other business or employment.

(d) Buyer covenants and agrees that he will prominently display the name "Midas Muffler Shop" on signs, circulars and other advertising, that in all such advertising matter, no other name shall be used (except Buyer may add his name as proprietor). Buyer further covenants and agrees that he will, at his own expense, locally advertise said products under said name to a reasonable degree, and Seller agrees to provide Buyer with mats, suggestions and advice with respect to such advertising. Buyer covenants and agrees to pay to Seller a surcharge of two per cent (2%) of the total amount shown on each invoice of the Seller, which amount Seller agrees to set

aside for national retail advertising purposes, and Seller agrees to spend such moneys for such purposes. Buyer must use only the advertising matter supplied and/or approved by Seller.

35 (e) Seller shall have the right to require Buyer to purchase and pay for such advertising programs as Seller shall approve for the particular locality of Buyer, when in the opinion of Seller such advertising is necessary for Buyer's successful operation of his franchise; and to join with other franchisees and to pay the pro rata cost of such advertising together with the other franchisees.

(f) Buyer must purchase from Seller for each outlet Seller's standard neon sign upon the opening of each outlet. All such signs must be conspicuously displayed in front of Buyer's premises at all times and properly maintained at all times. In the event of any termination of this agreement, Buyer shall not thereafter use said sign without Seller's consent, and Seller shall have the option, but shall not be required, to repurchase said sign, at cost less depreciation and expense of removal.

(g) Buyer covenants and agrees to procure and maintain, throughout the term of this contract, at his own cost and expense, insurance as described in rider hereto attached.

(h) Upon the execution of this agreement, Buyer agrees to purchase an opening stock for said store amounting to not less than \$..... at cost to the Buyer, for which Buyer shall pay one-half in cash, the balance to be paid net tenth prox.

(i) Buyer covenants and agrees that he will at all times maintain an adequate stock of Seller's products so as to fill all orders, and Seller agrees that so long as Buyer is not in default in any of the covenants, terms or

conditions of this agreement, it will use its best efforts to furnish all such requirements to the Buyer, but Seller shall not be liable for any loss or damage occasioned by Seller's failure to deliver such merchandise.

(j) Terms of payment of all purchases subsequent to opening purchase shall be net tenth prox.

(k) Seller shall have the right at all times to visit the place of business of Buyer, and the right of ingress and egress thereto, for the purpose of inspecting all inventories, the nature and quality of goods sold and services rendered, and the manner and method of operating said store under the terms of this contract; in the event any of Buyer's inventory or business is located outside of said store premises Seller shall have the similar right to inspect the same in said outside premises.

(l) Buyer reserves to himself ownership, management and control of said store.

III. PURCHASES AND SALES

(a) The prices to be charged by Seller and to be paid by Buyer shall be the prices published in price lists by Seller from time to time and identical with prices charged to all other Midas Muffler Shops.

(b) Buyer covenants and agrees that in selling said merchandise he will maintain the retail list selling price set by the respective automobile manufacturers for mufflers and exhaust parts, which list price will be published by Seller.

IV. GUARANTEES

(a) Subject to all other provisions of this contract, Seller agrees, during the continuance of this agreement, to replace and/or adjust to the Buyer any merchandise

purchased from the Seller by the Buyer within the limits of such specific guarantees as Seller furnishes, provided that such merchandise is returned to the Seller, with transportation charges prepaid, within sixty days from the date of Buyer's adjustment with his customer. Upon the termination of this contract for any reason whatsoever, Buyer shall not (except on his own responsibility, and without the right to return the same or obtain any adjustment therefor from Seller) make any further adjustments with any of Buyer's customers.

(b) Buyer covenants and agrees that in order to carry out said guarantee

(1) all written guarantees furnished shall be fully filled in by the Buyer at the time of the sale of said muffler or other part, and shall show the date of such sale, the name of the dealer, and the stock number of the muffler or other part sold.

(2) All customers relying thereon shall be required by Buyer to return to Buyer the muffler or part complained about, together with the original written guarantee furnished to the customer;

(3) Seller reserves the right to inspect and determine nature and cause of complaint so as to determine whether muffler in question is subject to return under said guarantee;

36 (4) Buyer shall not have the right to return any defective mufflers without first obtaining written permission from Seller, wherein Seller will direct disposition of the entire muffler or representative portion thereof, and Seller shall require that all mufflers returned as defective be accompanied by the guaranty ship provided with the original sale of the muffler, properly filled out.

V. TERMINATION AND GENERAL PROVISIONS

(a) This agreement may be terminated at any time by either party upon giving the other thirty days written notice of such intention prior to said termination date. The giving of such notice by either party shall relieve the Seller of selling or shipping any merchandise after the giving of such notice. Notice of termination herein provided for shall be sent to the respective parties at the address of their place of business as herein stated. The termination of this agreement shall not relieve either Seller or Buyer from the obligation to perform any covenant which this agreement requires to be performed after the termination thereof, and shall not relieve Buyer of his obligation to pay to Seller any unpaid portion of the purchase price of merchandise purchased from Seller during the term of this agreement, and any other amounts owing to Seller at such date. In the event of termination, all inventories on hand shall be disposed of as Seller shall direct. Buyer further agrees that if this agreement is cancelled by Seller because of any breach of the provisions hereof on the part of the Buyer, or if said agreement is otherwise cancelled under the terms hereof, the Seller shall have the option to purchase all of the trademarked Midas articles at Buyer's cost, less freight charges which are to be paid by Buyer, and less 10% for handling. Buyer further agrees that in the event of any termination of this agreement, he will (1) have all listings in the name of Midas or any similar name eliminated from telephone directories, and, if Buyer fails to do so expeditiously, Seller shall have the right and is hereby authorized by the Buyer to have such listings eliminated; (2) remove any and all signs containing the word "Midas" appearing in or about Buyer's premises.

(b) This agreement contains all of the agreements of the parties, expressed or implied, and no representations

made by any representative of Seller shall be binding unless expressly contained herein. A waiver by Seller of any violation of any provisions of this agreement shall not constitute a waiver of any further violation or any other provisions of this agreement. The license and sales agreement is not transferable without the written consent of Seller.

(c) The agreement shall not become effective until signed by both parties. Seller shall not be bound hereby unless this agreement is signed in its behalf by its president or one of its vice presidents, or by its secretary.

(d) This agreement shall be binding on and inure to the benefit of the parties hereto and their respective successors, legal representatives, heirs and assigns.

IN WITNESS WHEREOF, the parties hereto have executed this agreement in triplicate as of the day first above written.

MIDAS, INC. (Seller)

By
(President, Vice President or
Secretary)

..... (SEAL)

..... (SEAL)
(Buyer)

.....
Buyer's address

Witness to Buyer's Signature

.....
.....

Appendix A to Answer of Defendants Provisions of Defendants' Dealer Agreements.

65 (c) Buyer covenants and agrees that he will not, without Seller's written consent, handle in said store any products other than those purchased from the Seller, and/or render services in connection with the sale, installation and servicing of mufflers and related products which do not meet Seller's standard of high quality.

71 (c) Buyer covenants and agrees that he will not, during the continuance of this agreement, without Seller's written consent, handle in said store any products other than those purchased from the Seller, or render services in connection with the sale, installation and servicing of such products, since other products may not meet Seller's standard of high quality.

73 (b) Buyer covenants and agrees that in selling said merchandise he will maintain the retail list selling price set by the respective automobile manufacturers for mufflers and exhaust parts, which list price will be published by Seller.

74 (a) This agreement may be terminated at any time by either party upon giving the other thirty days written notice of such intention prior to said termination date.

IN THE DISTRICT COURT OF THE UNITED STATES

• • (Caption—No. 60 C 1636) • •

Answers to Interrogatory served on Corporate Defendants, International, Midas, Powell and Muffler Corporation of America.

302 "12. If you do not know the answer to Interrogatory No. 11, set forth the design and construction specifications for each different type of muffler which you sold during the period bearing the trademarks "Midas" or "International;" or, if your answer to the preceding interrogatory is wholly or partially negative, set forth with particularity and specificity the design or construction features distinguishing each different application or mufflers bearing the trademark "International" from those bearing the trademark "Midas" together with the periods during which each of these distinctive features existed."

Midas and International-brand mufflers have always carried different trade names, affixed to the mufflers themselves, and have been sold to different classes of customers.

Since on or about January 1, 1959 Midas mufflers have generally been produced with 16 gauge baffles and 20 gauge tubes whereas International-brand mufflers have been produced with 18 gauge baffles and 24 gauge tubes. Also the outer shells of the Midas and International mufflers have been of different design and color-tone, giving each of the two mufflers a distinct and different appearance.

DEFENDANTS' ANSWERS TO INTERROGATORIES

Answer to Interrogatory 38.

306 The total amount spent by International in national advertising of the Midas name in the period January 1, 1956 to December 31, 1960 was \$3,570,424.55.

This advertising has included advertisements in such magazines having national circulation as Life, The Saturday Evening Post, Readers Digest, T.V. Guide, Parade, Sports Illustrated, and This Week; sponsorship of, and spot advertisements in conjunction with, such national network radio programs as NBC News on the Hour, Monitor, Paul Harvey, and Gunsmoke; sponsorship of such national network television programs as Today, All Star Baseball Pre-Game Show, The Kentucky Derby Preview, PGA Golf Tournament, Jack Paar, Lawless Years, Suspicion, Five Fingers, Laramie, Plainsman, People Are Funny, and The National Open Golf Tournament; and display and other point of sale advertising supplied without charge to International customers handling Midas-brand products.

The following table shows the local stations that carried national programs advertising the Midas name in each of the cities in which plaintiffs' shops were located.

307

	NBC		CBS		ABC
	Radio	TV	Radio	TV	Radio
Washington	WRC	WRC	WTOP	WTOP	WMAL
Syracuse	WSYR	WSYR	WHEN	WHEN	WFBH
Binghamton	WINR	WINR	WNBK	WNBK	WENE
Elmira	WENY	WTVE	WLEM	WNBG	WLEM
		WSYE			
Utica	WSYR	WKTV	WIBX	WTEN	WTLB
Rome	WSYR	WKTV	WIBX	WTEN	WTLB

	NBC		CBS		ABC
	Radio	TV	Radio	TV	Radio
St. Louis—East	KSD	KSD	KMOX	KMOX	KNOX
St. Louis					WIL WBBR
Grand Rapids	WOOD	WOOD	WVEF	WKZO	WLAU
Muskegon	WOOD	WOOD	WBBM	WKZO	WKBB
Battle Creek	WJIM	WJIM	WKZO	WKZO	WELL
				WJIM	
Kalamazoo	WJIM	WOOD	WKZO	WKZO	WXYZ
Minneapolis	KSTP	KSTP	WCCO	WCCO	WTCN

PLAINTIFF SKARUPA'S ANSWERS TO INTERROGATORIES

Answer To Interrogatory II

452 e. Plaintiffs were not permitted to satisfy the demand for additional muffler shops in the Washington Metropolitan Area. Had they been permitted to, plaintiffs would have opened three additional shops which would have had additional sales of approximately \$100,000.00 per year each, or a total additional sales of approximately \$300,000.00 per year. Net profit would have averaged 20% per year.

Damages: \$60,000.00 per year.

Answer To Interrogatory IV

(Excerpts from Skarupa's Newspaper Advertisements)

461 Mufflers, Tailpipes, Dual Exhausts for Every Car and Truck.

Member America's Only Coast-to-Coast Network of Exclusive Auto Muffler Shops.

462 . . . we're specialists in just one thing—your car's exhaust system. . . .

463 ANNOUNCING! The Newest Member of The Great National Network of Midas Muffler Shops.

Look for the MIDAS Sign—America's only coast-to-coast network of exclusive auto muffler shops.

(Excerpts from Skarupa's Radio and TV Advertisements)

474 . . . visit any one of Washington's three MIDAS MUFFLER SHOPS. Famous MIDAS mufflers come to you . . . installed FREE within fifteen minutes, while you watch . . . with a written guarantee from the factory for the lifetime of your car. It's a guarantee that follows you around the United States, to more than 200 cities bearing the MIDAS MUFFLER SHOPS sign. . . .

476 . . . Your MIDAS muffler carries a written factory guarantee good from coast-to-coast. And always depend on MIDAS MUFFLER tailpipes & dual exhaust systems for complete safety. They're available at the SHOPS

devoted exclusively to your car's exhaust system needs . . .
your MIDAS MUFFLER SHOPS. . . .

481 . . . MIDAS dual exhaust specialists will convert
your present single exhaust system to a dual, in prac-
tically no time at all. You see, MIDAS exhaust experts
perform in minutes the work ordinary garages and dealers
take hours to do. . . .

485 . . . Your MIDAS muffler carries a written factory
guarantee good from coast-to-coast. And always de-
pend on MIDAS muffler tailpipes & dual exhaust systems
for complete safety. They're available at the Shop that's
devoted exclusively to your car's exhaust system needs
. . . the MIDAS MUFFLER SHOPS at. . . .

PLAINTIFF PIERCE'S ANSWERS TO INTERROGATORIES

Answer To Interrogatory IV

(Excerpts from Pierce's Newspaper Advertisement)

663 Member America's Only Coast-to-Coast Network of
Exclusive Auto Muffler Shops.

664 MIDAS Muffler Shops

SPRINGS

Installation Free
in 30 Minutes

(Excerpts from Pierce's Radio and TV Advertisements)

680 . . . When your car needs a new tail pipe or dual exhaust system there is only one place to take it—and that is to your nearby MIDAS Muffler Shop at

681 . . . Oddly enough though, despite all of the radical changes in automobiles, it was only recently that a really revolutionary method of servicing your car's exhaust system was developed. That, of course, is the MIDAS Muffler Shop method. . . .

685 . . . You can have confidence, your MIDAS man is a specialist trained to give your car dependable service! No matter what make or model car or truck—you can depend on MIDAS for the world's finest mufflers; tailpipes and exhaust systems. . . .

PLAINTIFF WHEELER'S ANSWERS TO INTERROGATORIES

Answer To Interrogatory IV

(Excerpts from Wheeler's TV Advertisements)

813 . . . Come in to the Midas Muffler Shop at . . . for your **FREE** exhaust system checkup. Then save money on a new Midas Muffler and Tailpipe.

817 . . . Let your dependable MIDAS exhaust system specialists give your car a FREE exhaust system safety check. . . .

818 Does your car need a new muffler? . . . tailpipe? . . . exhaust system service? Wherever you are throughout the U.S.A. you can depend on fast, reliable service at your nearby MIDAS MUFFLER SHOP (address). You get only nationally-advertised MIDAS products backed by a factory-written guarantee good for the life of your car!

(Excerpts from Wheeler's Newspaper Advertisements)

822 . . . Save Time at Your Exclusive Auto Exhaust System Center. . . .

823 . . . Original Muffler Specialists . . .

Answer of Plaintiff Gregory T. Skarupa, et. al. to Interrogatory No. VIII addressed to all Plaintiffs:

509 a. In September, 1955, Mr. Zuckerman was instructed by Gordon Sherman to call at my home to explain methods of operation of an International Parts Muffler Shop and to assist me in finding a location in which to do business. Mr. Zuckerman explained in detail how to order mufflers and tailpipes, provided me with International Parts catalogs and International Price Lists including the "white" sheet showing prices at which re-

tail sales would be made; the "yellow" sheet at which sales to the automotive trade would be made; and the 510 "blue" sheet showing the prices we would pay International Parts, for mufflers, tailpipes, dual kits, clamps, exhaust pipes, hangers, bushings, etc. During these communications Mr. Zuckerman was careful to explain that we were becoming a part of a chain operation that would charge the customer the same price coast-to-coast, and that our stocks should be bought exclusively from International Parts because of the guarantee that we would issue to the customer with each muffler purchased. These guarantees, issued with International Mufflers, would be honored coast-to-coast by other International Parts Muffler Shops.

Beginning with the signing of our Midas franchise for the Wheaton Shop in April 1956, and continuing throughout his tenure as a Midas Field Counsellor, Mr. Zuckerman constantly reiterated Midas policy against buying any automotive exhaust parts and/or allied automobile products from sources of supply other than Midas. Usually, these statements were made in the Wheaton shop to me personally, or in telephone conversations when Mr. Zuckerman called me concerning the amount of sales or general conditions of business. During these calls, 511 I would tell Mr. Zuckerman of various offers I had received from various tail-pipe manufacturers, clamp and hanger manufacturers, and from firms like the Goerlich Muffler Company to sell me automotive exhaust parts and allied automobile products at lower prices, and asked Mr. Zuckerman why I couldn't buy at the lower prices offered. Mr. Zuckerman's replies were always to the effect that Midas dealers were expected to buy all their stock exclusively from Midas and that dealers who bought their merchandise from outside sources were "asking for trouble." He often recited the situations at the Syracuse,

Buffalo, Philadelphia and certain Massachusetts dealerships which he had orders from Gordon Sherman to "straighten out." These recitations were told to me to dissuade me from buying from outside sources.

715 VIII Answer of Plaintiff Pierce Muffler Shops, Inc., by Joseph Pierce to Interrogatory VIII to all Plaintiffs:

715 e. Mr. Sherman related that he had discovered by means of a Midas ad that we had been selling 716 brake parts. He remarked about a Florida Midas dealer who had been terminated for instituting a brake installation service. He then insisted that I also discontinue my recently established brake line. He also requested that I stop selling shock absorbers and springs in my Elmira and Rome shops. I agreed not to sell the brake parts and to cease selling shock absorbers and springs in my Elmira and Rome locations.

VII Answer of Plaintiff Maxwell E. Ross, et al. to Interrogatory.

VII to all Plaintiffs.

915 Many oral conversations were held with Gordon Sherman and Lou Gurnick, with regard to "firm prices" in Battle Creek, Michigan. Tidey Auto Parts Co. was offering the same merchandise at greatly reduced prices which was hurting my position in that city. I wanted to reduce my prices so that I could be competitive. I was not allowed to do so. Letter to Gordon Sherman dated May 23, 1959 and his reply dated May 26, 1959. I was ridiculed by Gordon Sherman.

916 I was absolutely forbidden to handle any products other than those purchased from Midas, Inc. At the time I signed my franchise in Muskegon, Michigan, I was installing automobile glass and auto springs. As a matter of fact, the springs were sold to me by Jack Brezin, at that time the representative for Midas. I was allowed to continue with this operation until shortly after the Grand Rapids shop was opened (May 1956). I 917 was told by Mr. Brezin that I would have to discontinue installing springs in Grand Rapids and both glass and springs in Muskegon. The new "image" was a pure Midas operation. I capitulated to the degree that I stopped the installation of springs in both shops. I refused to stop installing glass in Muskegon.

To my knowledge, none of this information outlined above was in writing. Nor do I recall any witnesses being present when conversations with Mr. Brezin were being held. Later on, when Lou Gurnick became field counsellor, additional pressures were brought to bear to make me discontinue my glass business in Muskegon. Expressions were made, such as, "Things don't look too good for you in Chicago," and "Gordon doesn't like that." Many of these conversations were held in my office in Muskegon which was adjacent to the general office of the company. These conversations were overheard by my bookkeeper, Dorothy Nisch.

I was forbidden to buy pipes, shock absorbers, etc. from anyone but Midas. I knew that other Midas operators were installing shock absorbers, and even selling a second line of mufflers at lower prices. When I asked Lou Gurnick about this I was told this was "heresy" and that these Midas dealers were going to be punished. He showed me a memo from Gordon Sherman, addressed to his field counsellors about the cancellation of a Midas franchise in Florida because the dealer had dared defy

the company and had continued to install shock absorbers. I finally had to discontinue my profitable glass business in Muskegon because I was not only stopped from opening up in Battle Creek but was threatened with cancellation of my franchise. I capitulated January 1, 1959.

919 Answer of Plaintiff Maxwell E. Ross, et al. to Interrogatory VIII to all Plaintiffs.

919 3. and 4. I asked Lou Gurnick, field counsellor about buying tail pipes from Texas Tailpipe Co. I had heard that several other Midas dealers were buying them. His answer was: "Forget it. Gordon wouldn't stand for it." Specifically, I received a telegram from Lou Gurnick reading as follows: "Have been advised you are not buying clamps from Midas. You know this is company policy. Please see to it that you do from now on."

5. This was said to Joe Pierce. His franchise was revoked because he would not comply. This was also implied to me by Jack Brezin with regard to installing leaf springs in Grand Rapids.

1039 PLAINTIFFS' INTERROGATORY 19

Interrogatory 19 is as follows:

"19. If your answer to Interrogatory No. 18 is affirmative, state the general nature of each such study, studies or investigation and set forth with reference to each (a) the general findings of each study, studies or investigations; (b) the name and address of the person or persons who conducted such study, studies or investigation; and (c) whether you have a copy of such study, studies or investigation or any documents relating thereto in your possession, custody or control."

In the first two months of 1959 and again in October of 1959, orders from Midas dealers were analyzed by 1040 or under the direction of the defendant Robert

Schroeder with a view to identifying Midas franchisees whose purchases of Midas-brand pipes and clamps appeared to be very much out of proportion to their purchases of mufflers. On two occasions names obtained from such analyses were given to field counsellors to follow up. The purpose of this undertaking was three-fold: (1) to give special attention to helping those franchisees who needed to learn how to sell more pipes; (2) to determine which franchisees were keeping inadequate inventories which resulted in their having to buy more "fill-in" pipes at higher prices than necessary, and (3) to determine which franchisees were making substantial purchases of either pipes or clamps from sources other than International so that the field counsellors could make a greater effort to persuade them to make those purchases from International. A direct result was substantial reduction in the price of Midas-brand clamps, which aided the field counsellors' efforts to sell Midas-brand clamps. Documents relating to this undertaking are in the possession, custody or control of the defendants.

In some instances, beginning in 1959, Jim DuBose, an International employee whose job was to help Midas franchisees to train installers, reported non-Midas tail 1041 pipes or clamps that he had seen in Midas shops, and some documents relating to his reports are in the possession, custody or control of the defendants. Mr. DuBose presently owns a Midas shop located at 4230 South Kingshighway, St. Louis, Missouri.

1047- PLAINTIFFS' INTERROGATORY 21

Interrogatory 21 is as follows:

1048 "21. State the terms under which you made any sales of automotive exhaust parts during the period to each of the persons, firms or corporations listed in your answer to Interrogatory No. 20, setting forth with particularity (a) the nature of any quantity discounts; (b) the nature of any cash discounts; (c) the nature of any freight allowances; and (d) the nature of any allowances of any other kind."

1. The terms under which sales of International-brand automotive exhaust parts were made during the period to each of the concerns listed in our answer to Interrogatory 20 were, as in the case of Midas-brand exhaust system parts, net 10th prox., freight collect. A quantity discount in the amount of 10% of total purchases was allowed to one of the listed concerns, Wellston Tires & Supply, St. Louis, Missouri; Wellston was a particularly large distributor of automotive parts, selling insofar as defendants are aware exclusively at wholesale. The terms of sale of International-brand products differ from the terms of sale of Midas-brand products in that a 2% cash discount is allowed on all International-brand purchases for which payment is timely. Some of the concerns listed in answer to Interrogatory 20 did earn and receive such 2% cash discounts in the period covered by the interrogatory.

2. The terms of sale to Midas-brand customers other than the plaintiffs are set forth in answer to Interrogatory

29 filed December 3, 1964.

1110 VIII. 5. Answer of Plaintiff Pierce Muffler Shops, Inc. by Joseph Pierce to Interrogatory VIII. 5. to All Plaintiffs:

5. There were several instances where the defendants advised me that unless we desisted from purchasing automobile exhaust parts from other sources of supply our agreement would be terminated. Such statements were made for the most part by Midas representatives in my office in Syracuse. Several times one or more of these representatives would enter upon my premises and begin inspecting my stock of tail pipes for any indication that I might be selling goods purchased from manufacturers other than Midas. They would take notes, often suggest or state that what I was doing was in violation of Midas policy and refer their reports to the Home Office in Illinois.

Later this was followed by a visit by Mr. Gordon Sherman sometime in 1958 or 1959, who informed me that such continued activity would be "grounds for divorce." Soon thereafter my franchise was terminated for failure to comply.

1111 (e) Mr. Zuckerman entered upon my premises on several occasions and began inspecting my stock of tail pipes and other goods. He would make notes as he went along which indicated whether or not I was carrying goods purchased from manufacturers other than Midas. This occurred several times during the aforementioned years. He seemed especially interested in the tail pipes which I had purchased from Texas Tail Pipe Co. and which were marked similarly to those purchased from Midas. He indicated at one of these "inspections" that my handling of other goods "did not set too good with the fellas in Chicago."

1112 (e) The communications by Mr. Sherman in ad-
 1113 dition to referring to our policy of selling shock ab-
 sorbers and springs also indicated Midas' extreme
 concern and displeasure over our sales of automotive
 exhaust parts purchased from manufacturers other than
 Midas, especially tail pipes. Mr. Sherman told me in
 this light, "Joe, this is just like cheating on your wife;
 it is grounds for divorce." I replied regarding his state-
 ment that I felt like I was sitting on top of a fence; I
 was being forced to go one way or another.

1142 **DEFENDANTS' MOTION FOR
 SUMMARY JUDGMENT**

Defendants (other than Irwin Liss, an individual) by
 their attorneys, pursuant to Rule 56 of the Federal Rules
 of Civil Procedure and the order of this Court dated August
 13, 1965, move for a Summary Judgment dismissing the
 Amended Complaint with prejudice.

In support of this motion, defendants submit that the
 Amended Complaint, the depositions and interrogatory
 answers of the parties, the Affidavit and Appendix attached
 hereto and the exhibits and other matters of record de-
 ferred to herein demonstrate that there is no genuine issue
 as to the material facts set out below and that defendants
 are entitled to a judgment of dismissal of all three counts
 of the Amended Complaint as a matter of law.

1143 1. **Contractual Allegations in Counts One and Two**

Counts One and Two allege violations of Section 1 of the
 Sherman Act and Section 3 of the Clayton Act arising out
 of Midas franchise agreements executed by plaintiffs and
 defendants to govern their relationship in the purchase

and sale of automotive exhaust system parts through establishments displaying defendants' trade and service marks—"Midas" and "Midas Muffler Shop." It is alleged that the terms of these agreements illegally restricted plaintiffs in the operation of the Midas Shops, but the following undisputed facts conclusively preclude plaintiffs from arguing that such agreements were illegal or were injurious to their business or property.

(a). Each plaintiff initially asked to become a participant in the Midas merchandising program and voluntarily, willingly, and knowingly executed his first Midas franchise agreement; each plaintiff thereafter sought additional shops in the Midas program and voluntarily executed additional franchise agreements for such shops; each plaintiff at all times had the legal right to abandon the Midas program and to cancel these franchise agreements; ten of the eleven remaining plaintiffs unilaterally terminated their franchises when it suited their convenience, and the eleventh threatened to do so; each plaintiff voluntarily participated and cooperated with defendants, and with all other Midas dealers, in the conduct which plaintiffs now assert was illegal and injurious to their business and property; each plaintiff accepted the benefits arising out of the franchise agreement, and each plaintiff earned substantial and significant profits during the term of such agreements. Accordingly, each plaintiff was *in pari delicto* with defendants as to the asserted illegal conduct and is barred from recovering any alleged damages from such conduct.

1144 (b) In addition to the aforesaid bar of *in pari delicto*, the franchise agreements executed between defendants and each plaintiff and the merchandising methods employed by defendants in connection therewith were reasonable and legal means to protect the various Midas trade

names, trademarks and service marks licensed to plaintiffs by such franchise agreements, and were not prohibited by the Sherman or Clayton Act.

2. Conspiracy Allegations in Count One

Activities of the corporate and individual defendants in connection with the Midas program are alleged in Count One to constitute an illegal conspiracy to restrain trade in violation of Section 1 of the Sherman Act. But the record unequivocally shows that all the actions were accomplished by Nathan Sherman and Gordon Sherman and the other individual defendants, all of whom were officers and agents of the corporate defendants, acting through the Sherman family's wholly owned corporation, defendant International Parts, and its wholly owned or controlled subsidiary corporations, also named as defendants.

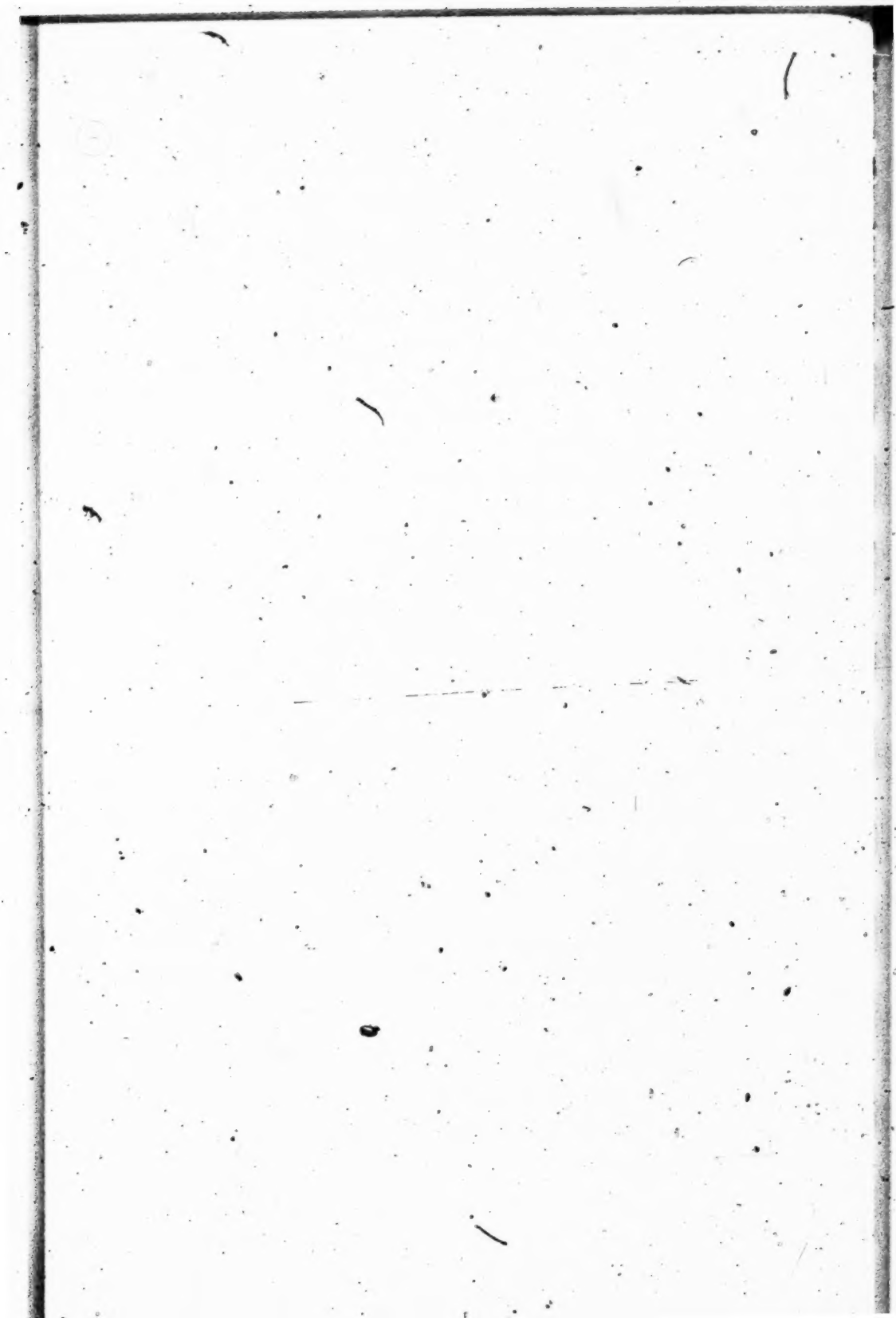
Such actions did not constitute an illegal combination or conspiracy, but were the legal acts of a single trader or business entity.

3. Discrimination Allegations in Count Three

Any difference in price or service, as alleged in Count Three, between purchases by plaintiffs of Midas brand exhaust parts and purchases by other persons of Midas brand exhaust parts or International brand exhaust parts from defendants did not constitute a discrimination, in that:

(a) Plaintiffs did not compete with other purchasers of Midas brand exhaust parts;

1145 (b) Plaintiffs had the ability and opportunity to purchase Midas brand exhaust parts or to purchase International brand exhaust parts;



(c) Retailers' and consumers' preference for the Midas brand exhaust parts system as a premium commodity, its inseparable and distinct guarantee, and its different metallic properties made it unlike in grade and quality to the International brand exhaust system.

WHEREFORE, defendants (other than Irwin Liss, an individual) request that this Court enter its order granting the Summary Judgment and dismissing the Amended Complaint with prejudice.

Dated: October 18, 1965

1191

IN THE

United States District Court

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

PERMA LIFE MUFFLERS, INC., et al.,
Plaintiffs,

v.

INTERNATIONAL PARTS CORPORA-
TION, et al.,

Defendants.

Civil Action
 No. 60 C 1636

AFFIDAVIT OF**NATHAN SHERMAN AND GORDON SHERMAN**

STATE OF ILLINOIS }
 COUNTY OF COOK } SS:

Nathan Sherman and Gordon Sherman, being first duly sworn on oath, depose and state that:

We are individual defendants in this action, are the chief executives of all defendant corporations, and are submitting this affidavit in support of defendants' motion for summary judgment. Either one or both of us have personal knowledge of the matters set forth herein.

International Parts Corporation was organized in Chicago in 1938 by Nathan Sherman. Through the period involved in this lawsuit he was the chief executive officer of it and its subsidiary corporations. His son Gordon Sherman was his principal assistant and an officer of the

corporate defendants. Subsequent to the commencement of this lawsuit, the subsidiary corporations of International Parts, including the other corporate defendants and other corporations were merged into International Parts and its name was changed to Midas-International Corporation.

International Parts in 1938 was engaged in the distribution of automotive replacement parts, primarily exhaust system parts, i.e., mufflers, tailpipes and exhaust pipes. Such items were sold, as International parts, principally to wholesalers and jobbers, who then resold them to retail outlets serving the consumer.

In 1949, International Parts acquired a majority stock interest in Powell Muffler Co., Inc., a company which was engaged in the distribution of exhaust system parts to wholesalers. In 1953, International Parts organized as a wholly owned subsidiary, the Muffler Corporation of America, a company which was engaged in the manufacture of mufflers and fabrication of tail and exhaust pipes. Its total product was shipped to International Parts or its subsidiaries, although both International Parts and Powell purchased exhaust system parts from other manufacturers.

Each of the corporate defendants was wholly owned or controlled by Nathan Sherman or members of his family. Affiants jointly managed the corporate defendants and directed the activities which the other individual defendants performed for International Parts, by whom they were employed and paid.

For many years prior to the formation of International Parts and continuing until the early 1950s, exhaust system parts were sold to the consumer almost entirely by garage service stations, repair shops, automobile agencies and

other, similar retailers. These retailers were in the business of general automotive repair and servicing and sold numerous replacement parts, of which exhaust systems were merely a portion. Normally, these retailers purchased exhaust system parts from wholesalers or jobbers, who had purchased them from distributors or manufacturers such as International Parts or its many competitors.

Prior to the 1950s, automotive replacement parts, except for tires, spark plugs and a few other items, were sold to the consumer without any individuality. Little, or no emphasis was placed on brand names. Virtually no consumer advertising was used beyond point of sale material. Although they were often-replaced items, exhaust system parts had little brand significance and received almost no individual attention by any, retail outlet. Most retailers sold exhaust system parts, and most other automotive replacement items, either as a simple sale of the part, or as an installed sale, in which event a separate and additional service charge was made for the installation.

Gordon Sherman joined his father's business enterprise in 1950 upon his graduation from college. His responsibility at that time was to assist generally in the management of International Parts and to learn the exhaust system business.

In late 1954 and early 1955, a change in the merchandising of exhaust system parts began to evolve. A few individual retailers had begun to specialize in the installation of exhaust system parts to the exclusion of other types of automotive repair or parts replacement. Some retailers began to attract the motorist's attention to exhaust systems by an offer to sell a muffler as an installed item, with no separate charge for installation. Significantly, the automobile manufacturers had, at this time, in-

creased the market for replacement of exhaust system parts by their introduction of the dual exhaust system in most automobiles. What occurred thereafter is the history of the Midas Muffler Shops and of the merchandising methods which were employed to create a new market for the sale of exhaust systems.

In 1955, affiants organized Midas, Inc. as a wholly owned subsidiary of International Parts; its sole asset was ownership of the various Midas trademarks, trade names and service marks. Its only additional assets since then have been its rights under the franchise agreements subsequently executed with individual Midas dealers. Midas, Inc. has had no employees, nor held title to Midas products, all of which have been sold by International Parts.

Nathan Sherman continued to divide his time between the over-all management of International Parts and its subsidiaries and the direct supervision of products theretofore sold by International Parts. Gordon Sherman was the International Parts officer who assumed direct supervision for the Midas merchandising program.

Two separate, yet totally interdependent, elements formed the basis for the Midas system that was subsequently developed: 1) a new method of distribution and merchandising; 2) national advertising.

First, International Parts decided that, rather than extend its business operations by direct ownership and management by its employees of many isolated retail outlets throughout the nation, it would continue only to manufacture and distribute exhaust parts and would franchise and assist independent owners of specialized retail outlets to sell to the consuming public. From this decision developed the nationwide chain of independently owned and operated Midas Muffler Shops.

Second, International Parts decided upon an over-all promotional concept that would identify to the consumer the then unknown muffler with the new trade name "Midas" and the new service mark "Midas Muffler Shop." Extensive national and local advertising were used to bring about initial consumer recognition of the Midas exhaust system and the Midas Muffler Shop. Once brand recognition had been accomplished, it was still necessary to convince the consumer of the desirability of purchasing the Midas exhaust system. Accordingly, the advertising program had to educate the motorist as to the unique benefits awaiting him at the Midas Muffler Shop.

Midas was to mean a lifetime guarantee. By the purchase of one such muffler the motorist received the right to unlimited replacements for as long as he owned his car. Moreover, this guaranteed replacement was not limited to the Midas Shop from which the original purchase had been made, but the guarantee would be recognized at every Midas Muffler Shop in the nation.

Midas was to mean free installation. All that the motorist paid for was the product he received. This added service could now be given by the individual Midas dealer because he no longer absorbed the mark-up from a middleman, a wholesaler or jobber, but received direct factory shipments of exhaust parts from International Parts.

The continuing attraction of Midas to the motorist could not totally depend on the quality of the product, its unique guarantee or the free installation. A most important element in such attraction had to be the favorable image and reputation reflected by the individual Midas dealer from whom the product was obtained. Because of the ubiquitous nature of the guarantee and the ever-increasing mobility of the American consumer, each Midas outlet had to convey the selfsame image and reputation.

Automobile repair and replacement work had traditionally been done at garages, service stations, repair shops and other outlets which were engaged in all phases of automobile repair and service. Few of these retailers were experts or specialists in any one phase of automotive work. Often their premises were unattractive and unkempt. The motorist would deliver his automobile to the shop, would be advised that the work would take several hours, and would return at the later time to be told that the necessary, but unobservable, work had been done. Midas was to mean the exact opposite.

A "Midas Muffler Shop" sign was to identify a specialist in exhaust systems. The premises were to be clean and tasteful, both on the exterior and in the interior. A motorist would be told that the installation would take 15 minutes, and during this time there would be a comfortable waiting room from which he could personally observe expert workmen efficiently remove the old exhaust system and install the bright golden Midas muffler.

National and local advertising of "Midas" and "Midas Muffler Shops" was undertaken in 1956 by International Parts and by the individual Midas dealers. All channels of communication were employed: television, radio, billboards, newspapers and magazines. A detailed explanation of this national advertising program, including the specific programs, magazines and other media, has been set forth in defendants' answer to plaintiffs' Interrogatory 38. A total of \$3,570,424 was spent for national advertising of the Midas exhaust system from January 1, 1965, to December 31, 1960. Midas dealers were licensed to advertise the various Midas trade names, trademarks and service marks, and the dealers' total expenditures for local advertising of these names and marks paralleled International Parts' national advertising program.

Since each dealer licensed to use the "Midas Muffler Shop" service mark was an independent businessman, several steps were taken to assure the public, and also to insure the participating Midas dealers, that everyone involved in the Midas program would perform in accordance with the Midas image. Each prospective Midas dealer was fully advised as to the nature of the program and of the need to commit himself to conform his prospective shop operation to the operation of each other dealer. To implant in each dealer the seriousness of this voluntary commitment, and also to convey to the dealer the right to use the trademark, trade name and service mark, the License and Sales Agreement was signed by each dealer.

Verbatim copies of the franchise agreements used during the period that the plaintiffs continued in the Midas program were attached to plaintiffs' Complaint and to defendants' Answers. No fee or payment was required or received from any dealer in consideration for the right to use the Midas name. Each dealer retained complete ownership of the premises where he operated. Each dealer had the right to cancel the franchise agreement on thirty days' notice. No restriction was placed on the dealer's right, upon cancellation, to continue in the muffler installation business at the exact location from which he had operated a "Midas Muffler Shop."

Many prospective Midas dealers were unfamiliar with the exhaust system business and some were inexperienced in any business venture. Such individuals required assistance in establishing their new business as well as continuing counsel in how to manage the business and thereby prosper. An International Parts employee initially assisted most new dealers in selecting a suitable location and in arranging an equitable lease. Insurance, furnishings, equipment, hiring of employees, and all of

the other necessary provisions to start a business were arranged with the assistance of International Parts. Many dealers were brought to Chicago or to other Midas Muffler Shops to familiarize them with the actual operation of such a shop. Early in the Midas program, a new and specially chosen group of International Parts employees were designated as Midas field counselors. These eight men moved throughout their territories securing locations, placing dealers in business, giving them their initial instructions, helping them with their personnel, guiding and coordinating their advertising, and interrelating their needs with defendants' services to them.

Many miles separated most Midas dealers from other Midas Shops, so that there was little opportunity for dealers to exchange the valuable experiences each encountered in the operation of his own shop. By 1957, 120 Midas Muffler Shops were in operation, and in March of that year International Parts provided the necessary forum—the first national convention of Midas dealers. Subsequent years saw both national and regional meetings at which dealers met and discussed the efforts in which they were mutually involved. Several of the present plaintiffs spoke at one or more of these meetings.

As the number of Midas dealers increased, a select group of ten Midas dealers from various sections of the country was requested to confer periodically and consider methods to improve Midas, thereby assisting each participating dealer. This group was called the National Advisory Council; each of the individual plaintiffs voluntarily served on this Council. An additional medium for communication between the separate Midas Shops was provided in The Dealer Dabbler, a magazine which International Parts published and distributed to each Midas dealer. Two of the present plaintiffs have contributed articles to this magazine (PX 30 and PX 36).

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Most of the individuals who entered the program paralleled the expansion of the present plaintiffs and after their first franchise they opened additional shops. By the time plaintiffs terminated their franchises in 1959, there were 268 Midas Muffler Shop dealers; the vast majority of whom enjoyed success and prosperity.

NATHAN SHERMAN

GORDON SHERMAN

SUBSCRIBED AND SWORN to
before me, this eighteenth
day of October, 1965.

DAVID J. GIBBONS
Notary Public

The material from page 73 to and including page 105 has been printed at Respondents' request. Petitioners do not believe that this is material which is part of the record inasmuch as it represents nothing more than Respondents' editorialized account of what the record shows. Record references within this material do constitute a part of the record.

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United States District Court

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

PERMA LIFE MUFFLERS, INC., et al.,
Plaintiffs,

vs.

INTERNATIONAL PARTS CORPORATION,
et al.,

Defendants.

Civil Action
No. 60 C 1636

APPENDIX

This Appendix contains a separate chronological summarization with respect to each plaintiff. The record references throughout relate to a specific page, *e.g.*, (100), of the plaintiff's deposition testimony, except where such reference specifically identifies another record source, such, as (Dep. G. Sherman) p. 100) or (Plaintiff's Interrogatory Answer IV). After the initial depositions a further production of documents by plaintiffs was necessary, and when this was completed each plaintiff appeared for a supplemental deposition, which testimony is identified by the letter "S," as (S. 100). Documents produced by plaintiffs or defendants and marked at depositions are identified as (DX 100) or (PX 100). All deposition transcripts and exhibits have been filed with the Court.

Throughout the Brief in Support of Defendants' Motion for Summary Judgment the factual statements therein are referenced to the exact page of this Appendix, as (App. 1).

I.

GREGORY T. SKARUPA

Gregory Skarupa is the alter ego of four plaintiff corporations¹ owned by him and his wife (4-8). These corporations, from March 1956 to February 1960, operated Midas Muffler Shops in the Washington, D.C., area.

Pre-Midas

Skarupa became a resident of Washington, D.C., in 1939 when he was employed as a clerk and messenger by a government agency (10-11). In 1955, while employed by the Veterans Administration, he visited his brother-in-law's muffler shop in Cincinnati, Ohio, and since it appeared profitable Skarupa decided to open a similar shop (14-15, 17). Skarupa had no prior business experience with automotive exhaust systems or allied automobile products, but his military service had given him a familiarity with automobile parts (13).

His brother-in-law was then purchasing and installing International Parts exhaust systems, and he arranged a telephone introduction between Skarupa and Gordon Sherman (15-16). About September 1955, an International Parts salesman contacted Skarupa and discussed Skarupa's desire to duplicate the Cincinnati operation in the Washington, D.C., area, whereupon the International Parts

¹ Those corporations identified in paras. 16(A) through 16(D) of the Amended Complaint, as Perma Life Mufflers, Inc., Perma Life Mufflers of Arlington, Inc., Perma Life Mufflers of Prince Georges County, Inc., and Perma Life Muffler Shops of Alexandria, Va., Inc. (R. 15)

salesman agreed to help Skarupa start in business (16, 18, 20). Without contacting any other manufacturer, Skarupa began to look for a shop, and within about five days he had decided upon a location in Wheaton, Maryland (20, 22-23). By October 15, 1955, he had contacted an attorney, formed Perma Life Mufflers, Inc. and had the official opening of his Perma Life Muffler Shop (8, 23-24). His investment in this instance was \$5,200 (128, S. 27). His full-time employment with the Veterans Administration continued (12).

First Midas Franchise

From October 1955 to March 1956 Skarupa purchased and installed International exhaust systems (29), even though he understood that he could have handled any brand he desired (293). Although it was not until March 1956 that Skarupa first discussed with defendants the new Midas program which was then being introduced (16, 27, 29), he had previously discussed the proposed national chain of Midas shops with his brother-in-law (16-17). Gordon Sherman subsequently visited Skarupa's shop and discussed the Midas franchise requirements (29-30), the proposed national advertising (32), and the national guarantee which would be honored by each member of the chain (32-33). Skarupa's only concern was to obtain a franchise for the entire Washington metropolitan area in order that he "could reap the benefits of such development" (30, 35). Although he noticed other requirements in the franchise agreement, in his "heat of going into a new program" the only portion that concerned him was the geographical area of his franchise (35).

After this conference a franchise agreement was prepared and signed on April 10, 1956 (DX 13, 31-32). Skarupa examined this franchise "in detail," including the

provisions on purchases, 2% advertising surcharge, prices and payment terms (46-47). He understood that the franchise related to the Midas trademark (47) and that an International Parts purchaser, which he then was, was not governed by the Midas franchise or merchandising methods (292). Although the Midas terms of payment were 10 days, Skarupa initially received an extended period of payment by use of 30, 60 and 90 day notes to help him get started (173-74).

Expansion in Midas

Skarupa's shop in Wheaton was profitable throughout 1956 (135) and within a short time after its change from a Perma Life Muffler Shop to a Midas Muffler Shop Skarupa was looking to expand to a second location. On December 1, 1956, he signed a second Midas franchise agreement covering a shop at Arlington, Virginia (DX 16). About \$1,000 of Skarupa's personal funds were invested in this second shop (130).² His full-time employment at the Veterans Administration continued (12).

Almost immediately after this second Midas shop opened, Skarupa began thinking about a third shop, in Prince Georges County, Maryland (135), and on May 6, 1957, a franchise agreement was signed for a Midas Shop located in Cottage City, Maryland (DX 17). The capital investment in this instance was about \$2,500 (136).

All three Midas Shops were then profitable (137), even though Skarupa was still a full-time employee of the Veterans Administration (12). His personal commitment to these business ventures amounted to a visit to a different shop every evening after his departure from his "regular employment," a visit and inspection of each shop on Satur-

² Skarupa's financial success by 1958 allowed him to purchase for \$55,000 the building in which this Arlington shop was located (129).

day, plus the necessary bookkeeping work which he did in the evenings (144-45). Skarupa's personal investment in his three Midas Shops was \$8,800; although he was only a part-time Midas dealer, by 1957 he had received over \$35,000 in wages as a corporate officer and in pre-tax corporate profits (DX 117-18).

In the fall of 1957 Skarupa began to look for further expansion into Alexandria, Virginia, and he was then advised that he would have to honor the Midas franchise provision that the owner devote full time to operation of the shop (137-38). In March 1958, Skarupa left the Veterans Administration, and with defendants' assistance he located a site in Alexandria and opened his fourth Midas Shop on July 30, 1958 (DX 18, 137-38). His capital investment in this shop was about \$1,000 (139).

Advertising and National Participation in Midas

All of Skarupa's Midas Shops had the "Midas Muffler Shop" sign outside the buildings and Midas point of sale material within the buildings (132-33). Skarupa "advertised extensively in order to get the business started" (126) and his local advertising continued throughout his relationship with defendants. The printed advertisements and radio or television script that he used prominently emphasized "Midas," "Midas Muffler" and "Midas Muffler Shops," "Unconditional Factory Guarantee," "Specialists" and "15 Minute Service."

The marketing area for Skarupa's four shops was confined to the cities and counties in which they were located⁴

³ Skarupa's Answer to Interrogatory IV has 26 sample advertisements attached to it. (R. 461-65; R. 471-41)

⁴ Skarupa's Answer to Interrogatory V. (R. 493)

(187-88), and he was not in competition with any of the other plaintiff dealers (302-03). Even so, Skarupa's personal involvement with the Midas merchandising methods extended beyond the Washington, D.C., area. He became a member of the original National Advisory Council and served with that group until March 1958 (166). At one of the conventions of Midas dealers Skarupa gave a formal presentation (165). He was also a contributor to The Dealer Dabbler in which he took exception to a prior article by plaintiff Maxwell Ross (PX 36).

Desire to Expand

After the Midas Shop in Alexandria opened, Skarupa sought "to open up additional shops" (56) since he thought that three additional shops could be established in the Washington area (316). However, in late 1958, he was allegedly told that he could not expand further (162) and that other Midas dealers were to be established in the Washington area (57). At a meeting with Gordon Sherman in early 1959 Skarupa discussed his desire to expand his Midas operation further (59). According to Skarupa, he was offered one more Midas franchise but was informed that additional franchises in that area would go to other dealers (59).⁵ Such an arrangement was unacceptable to Skarupa since it did not protect him from possible competition (59). After this conference Skarupa did not again discuss with defendants the question of his opening more Midas Shops (S. 42).

⁵ One of defendants' purported objections to Skarupa's further expansion was that he "was making too much money" and would need investment advice (60). DX 119 shows that for 1958 Skarupa's personal corporate salary for nine months' full-time effort was \$44,000 and his corporate profit was an additional \$23,109, for a total of \$67,109.

During this same late 1958 and early 1959 period Skarupa encountered other actions by defendants which he considered unacceptable. The credit allowed to the dealer upon return of a muffler had been reduced in January 1959, and the new Midas muffler, according to Skarupa, was no better than the original muffler and in some instances inferior (167-68). In April 1959, Skarupa began to install shock absorbers which he purchased from a former sales representative for International Parts (202).

Solicitation by Competitors and Abandonment of Midas

A Robin Hood representative for Maremont Corp., Bert Herskee, contacted Skarupa in the spring of 1959 (195).⁶ He had known Herskee when Herskee was previously employed by International Parts (195). Herskee advised him that Maremont was going to start a chain of Robin Hood muffler shops and explained the purported advantages to a Midas dealer who would switch to that franchise, emphasizing the paramount attraction to Skarupa—an exclusive franchise for the entire Washington metropolitan area (196-97).

Periodically thereafter Skarupa was visited by Herskee and urged to sign a Robin Hood franchise agreement (197).⁷ In late November 1959, Skarupa decided to abandon Midas and change over to Robin Hood (189-90, 194-95, 197). On December 11, 1959, Skarupa exercised his right to terminate

⁶ Robin Hood is the brand name for exhaust systems sold by the Maremont Corp., a competitor of defendants (194-96).

⁷ Solicitation of Skarupa by defendants' competitors was not limited to Maremont. In 1958 the president of the Texas Tail Pipe Co. telephoned Skarupa to solicit his business (273-74). Skarupa described such solicitation as a "regular stream of salesmen" (270).

the Midas franchise agreements (DX 25). His reasons for termination were defendants' refusal to allow further expansion, the proposed competition from new Midas dealers in the Washington area, and the restriction on purchases (190-91). Eight days later Skarupa signed the Robin Hood franchise agreement (DX 105), and the first delivery of Robin Hood mufflers was phased to arrive the day after the Midas termination was effective (204). All of the Midas trademarked parts were returned to defendants (204).

Post-Midas Experience

When Skarupa left the Midas program on February 11, 1960 (70), his four Robin Hood shops began to sell many of the allied automobile products described in the Amended Complaint (216, 219, 241). Since Robin Hood gave no guarantee to the consumer, Skarupa began to issue his personal guarantee (200). Within this first fiscal year, 1960, each of his four former Midas Shops operated at a loss⁸ for a total of approximately \$13,700 (222, 243). His loss in the second year, 1961, was approximately \$30,000 (243).⁹

In early 1962 he decided to get rid of the business (254), and by February 12, 1962, he sold all four shops for about \$70,000 (10, 257). Two years as a Robin Hood dealer had necessitated that Skarupa return to his former employment at the Veterans Administration.

⁸ Skarupa characterized his problem as "related to a relatively unknown name to the public" [i.e., Robin Hood] and admitted that for motorists the name Midas provided "more reliance and dependence" (318).

⁹ The corporate federal tax returns for 1961 show a total loss of \$31,076 (DX 64, 65, 66 and 67).

Midas Profits

Skarupa's financial experience in the four Midas years, 1956 through 1959, was significantly different. His corporate profit and personal wages totaled \$182,763.31¹⁰ from a personal investment of \$9,800¹¹ and only a part-time commitment of his own time for over half the period. When in 1958 he gave up his government position and became a full-time Midas dealer his corporate and wage income totaled \$67,109, consisting of personal wages of \$44,000 and corporate profit of \$23,109 (DX 119). For 1959 his income was \$80,607, consisting again of personal wages of \$44,000 and a corporate profit of \$36,607 (DX 120). Skarupa's personal wages for *each* of the years 1958 and 1959, \$44,000, *exceeded* his total personal income for all of the six years prior to Midas.¹² These profits were actually increased by about \$18,000 for 1958 and 1959, since the rent expense (DX 109 and DX 113) for Skarupa's Midas Shop in Arlington, Virginia, was in part a payment to Skarupa since he had purchased that building (129).

For these four years Skarupa voluntarily continued in the Midas program,¹³ he received approximately \$200,000

¹⁰ 1956 shown on DX 107 and DX 117; 1957 shown on DX 118; 1958 shown on DX 108 through DX 111 and DX 119; 1959 shown on DX 112 through DX 115 and DX 120.

¹¹ Skarupa's Answer to Interrogatory III.

¹² Skarupa's Answer to Interrogatory XV shows that his pre-Midas income for 1950 through 1955 was between \$5,000 and \$7,700 per year. (R. 881)

¹³ Skarupa estimated that he serviced about 57,000 automobiles during his period with Midas (97).

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in profits. By this suit he seeks to recover an additional profit of \$843,132.¹⁴

Conspiracy Allegations

No basis for the alleged conspiracy among the corporate divisions of International Parts and their officers and agents was testified to by Skarupa. He acknowledged that any documentary evidence relating thereto would have been within documents he produced (77-79), yet none of these documents support this assertion. The only conspiracy which he alleged was an understanding that he and all the Midas dealers were to follow the price lists (74-75).

II.

MAXWELL E. ROSS

Maxwell Ross and his relationship with defendants from late 1955 until late 1959 provided the factual setting for the allegations made by five plaintiffs,¹⁵ through which Ross operated four Midas Shops located in Muskegon, Grand Rapids, Kalamazoo and Battle Creek, Michigan, and two in Minneapolis, Minnesota. Ross and his wife were the sole owners of these business enterprises and Ross was the chief executive (28-29).

¹⁴ Skarupa's Answer to Interrogatory II. He seeks an additional amount in damages because of the restriction on his further involvement in the Midas Program by not being able to open three more Midas Shops (310-11, 316-17). (R. 449-57)

¹⁵ Those plaintiffs are identified in paras. 16(E) through 16(I) of the Amended Complaint as: Robin Hood of Grand Rapids, Inc.; Robin Hood of Muskegon, Inc.; Regina M. Ross, assignee of Maxwell F. Ross, t/a Robin Hood Muffler Shop; Regina M. Ross, assignee of Maxwell E. Ross, formerly t/a Midas Muffler Clinic of Minneapolis; Regina M. Ross, assignee of Maxwell E. Ross, formerly t/a Midas Muffler Shop of Battle Creek. (R. 15-16)

Pre-Midas

Prior to 1951, Ross did accounting work and had business experience as the organizer of a concern which sold automobile car polish (4-7). Beginning in 1951 he was the sole proprietor of Heights Auto Parts Co., an auto parts and wrecking business located in Muskegon, Michigan (7-8), which concern sold new and used auto parts, including exhaust systems which it purchased from International Parts (10, 14, 21). In Ross' sales of exhaust systems at that time "brand names were not important" (24). In November 1955, Ross acquired a new location in Muskegon for his auto parts business (20).

First Midas Franchise

In late 1955, Ross discussed with an International Parts salesman the Midas merchandising method which Ross described as the "new concept" of selling an exhaust system under a "free installation" approach to the consumer (224). The Midas concept—the guarantee, the national advertising, and the quick service of 15-minute installation—"excited" him (239-40). He recognized this as a good idea, "a magical term," and thought "it was a way of making some real money" (239).

Ross was then purchasing International brand exhaust system parts, and he was cognizant of the different methods whereby International Parts merchandised its International brand and its Midas brand, including the different terms of sale and an additional 2% surcharge for national advertising of the Midas brand (229-30).

After his exposure to this "new concept" (224), Ross investigated it further and inspected a Midas Shop in Milwaukee, Wisconsin, to find out "the things a person would normally want to know" before going into such a business

(226). Ross thinks that he may have consulted an attorney at this time (361-62). Within a month, December 7, 1955, Ross read and signed his first Midas franchise agreement (237, DX 9 and DX 10), and on December 15 he started installation of the Midas exhaust systems (36).

Expansion in Midas

Thereafter Ross sought to expand his Midas operation and to open additional shops in other cities in Michigan and Minnesota. His first expansion occurred within six months when he opened a Midas Shop in Grand Rapids, Michigan, and executed his second Midas franchise agreement in May 1956 (39-40, 120). Several months later, and still within a year of his first knowledge of Midas, Ross extended his operation to Minnesota with the opening in October 1956 of a Midas Shop in Minneapolis (42-43). At that time, Ross sought an exclusive franchise for all future Midas Shops in Minneapolis and St. Paul (44), even though he had never before engaged in business in that area (127). In May 1957, Ross expanded his Minneapolis operation with the opening of his fourth Midas Shop and his second in that city (47).

By April 1958, Ross had sold one of his Minneapolis shops (127-29), and his other Minneapolis shop was closed in August 1958 (185). Contemporaneous with closing his Minnesota operation, Ross in April 1958 purchased a Midas Shop in Kalamazoo, Michigan (168-69). He operated this Kalamazoo shop for about a year when he decided to seek a better location, and after consultation with the Midas architects (170-71) he constructed a new building in Kalamazoo "in keeping with the Midas concept" (62). Approximately three months after the new shop had been operating he recognized that there was need for only one shop in Kalamazoo and closed the original shop (172-73).

In May 1959, Ross again expanded his operation when he opened his fourth Midas Shop, in Battle Creek, Michigan (55).

Geographically, the market area for Ross' four Midas Shops encompassed the Michigan counties of Muskegon, Kent, Kalamazoo and Calhoun (278-79).¹⁶ He described his sales impact in these areas as "tremendous" because of this "effective" and "novel" concept (281). His volume of business during 1959 increased to the point that he purchased a tractor and trailer to transport Midas merchandise from Chicago to his four shops throughout the Michigan area (231-32).

Advertising and National Participation in Midas

Ross recognized that advertising of the Midas exhaust system made a significant contribution to his market "impact," that Midas originated direct consumer advertising of mufflers, that by such advertising "the Midas story had become known" and created a public "demand," and that such advertising had given Ross the valuable image of "more substance" and "more credibility" (212, 313, 322, 427). Ross' shops displayed "the Midas sign identification" (268).

To supplement the Midas national advertising which reached his area (390-391), Ross employed local advertising¹⁷ using material furnished by defendants (306).

¹⁶ Interrogatory Answer V states "city or county in which each" shop was located. (R. 911)

¹⁷ A detailed statement of Ross' advertising of the Midas trade name and service mark is contained in his answer to Interrogatory IV. (R. 907-10)

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and it was successful (302) to the extent that he "was known as Mr. Midas" (S. 202).

Ross' involvement with Midas and its merchandising methods during the four-year period of his franchise agreements was not limited to his own shops. In early 1957, Ross became one of the original ten members of the dealers' National Advisory Council (284). According to Ross, the purpose of this Council was the formulation by dealers of "ideas and patterns of operation to produce the optimum profit for each Midas operator" (288). He characterized himself and the other dealers as initially being "guinea pigs" (303). His own contribution to the Council and to all Midas dealers was the help he gave to create the Midas field counselor (287), whose function was to visit the shops and help improve them (290). As late as May 1959, Ross had a letter published in *The Dealer Dabbler* wherein he circulated suggestions to all Midas dealers (PX 30).

Desire to Expand

Significant success came to Ross' new shop in Kalamazoo whereupon he decided to expand by opening a second Midas Shop in Grand Rapids (172-73). Ross, in early 1959, "liked the program," so much that he offered to construct two new buildings in Grand Rapids and then to vacate the older premises where he was then operating a "very prosperous shop" (172-74).

During this same period Ross became displeased with certain actions of defendants. He encountered hesitancy from defendants in concurring with his desire to add another outlet in Grand Rapids (172). Just prior to this time Ross had disagreed with defendants over the return

of merchandise involved in his purchase of the Midas Shop in Kalamazoo (170). He was unhappy with the change in the muffler replacement credit to the dealer which had become effective in early 1959 and which in Ross' judgment had become prohibitively expensive (179).

Solicitation by Competitors and Abandonment of Midas

In early 1959, Ross spoke with an unnamed Robin Hood¹⁸ representative concerning the possibility that Ross terminate his relationship with Midas and that he affiliate with the Robin Hood franchise system of selling exhaust systems (161-62).¹⁹ Subsequently Ross was visited by Bert Herskee, a former Midas field counselor who was then the sales manager for Robin Hood, and Ross was again solicited to abandon Midas and convert to Robin Hood (162-63). Among the enticements offered to Ross was the exclusive Robin Hood franchise for the entire State of Michigan, a second line muffler, and the availability of merchandise at a cheaper price (163).

When Herskee again solicited Ross in October 1959, Ross agreed to terminate his Midas franchises and to change over to the Robin Hood program (166-67). On November 13, 1959, he exercised his contract right and sent a letter to defendants terminating his Midas franchises (146-47, DX 6 and DX 7). He tried to sever all connections, including the return of merchandise, within thirty days (315).

¹⁸ Robin Hood is the brand name for exhaust systems sold by the Maremont Corp., a competitor of defendants (151).

¹⁹ Ross characterized the Midas Shops as being known in the trade as "a successful organization individually and collectively." He was contacted and solicited all through this time by defendants' competitors (396-97).

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Post-Midas Experience

On December 13, 1959 (150), Ross began to sell exhaust systems as a Robin Hood dealer. He continued to operate his four shops in substantially the same manner, the only change being the introduction of shocks and springs (152). Although Ross obtained a franchise agreement from Maremont as the exclusive Robin Hood dealer for the State of Michigan, he did not open any additional shops (152). Under the Robin Hood program, no written guarantee to the consumer was issued by the manufacturer (S. 172), and so Ross issued his personal guarantee to the customer which he described as approximately the same as the Midas guarantee (164).

Without dispute, as a Robin Hood dealer Ross was financially unsuccessful (315). Robin Hood had no national significance and had never "spent the kind of money on national advertising that Midas did" (319-20). Ross spent a good deal of money advertising the Robin Hood program (337). Two former Midas Shops closed in the first year, Battle Creek in August 1960 and Kalamazoo in December 1960 (185-86). For his first fiscal year as a Robin Hood dealer, July 1960,²⁰ Ross had a corporate loss of \$20,165 (DX 184). Grand Rapids closed in October 1961 and Muskegon in December 1961 (325). In two years his former Midas Shops were out of business.

Midas Profits

Significant and undisputed financial success came to Ross during his four years as a Midas dealer.²¹ In the fiscal

²⁰ Ross had a fiscal year for all his business ventures of August 1 through July 31.

²¹ Ross' income tax records for the period prior to 1955 are not available (Ross' Interrogatory Answer XV). (R. 942)

year ending July 31, 1956, during which time he operated his wrecking business and opened his first two Midas Shops, he had a net profit of \$21,139 (DX 179). During the fiscal year ending July 1957 his profit had risen to \$75,961 on his Michigan shops, with an over-all profit of \$52,716, limited by the losses on the distant operations in Minnesota (DX 180). During the next fiscal year Ross incorporated his various shops and in July 1958 had a total profit of \$41,198, consisting of a pretax corporate profit of \$20,398 plus a personal income as a corporate officer of \$20,800 (DX 181). For the 1959 fiscal year Ross had a total profit of \$39,313, including a pretax corporate profit of \$18,513 and a personal income of \$20,800 (DX 183).

In four fiscal years Ross made approximately \$154,000 as a Midas dealer. By this lawsuit he seeks an additional \$488,400²² in alleged unobtained profits for this same period.

Conspiracy Allegations

Ross' knowledge of the alleged conspiracy among defendants was based solely on the relationship between International Parts and Midas (98).²³ He admitted that he knew of no events relating to the alleged conspiracy (394-95) and that he had turned over to his counsel all documents relating thereto (97).

²² Paras. 41(E) through 41(1) of the Amended Complaint. (R.157)

²³ Ross admitted that he did no business with the defendant Powell Corp. and that none of his competitors were customers of Powell (409). He never mentioned defendant Muffler Corp.

III.

JOSEPH PIERCE

Pierce Muffler Shops, Inc. was the corporate structure through which Joseph Pierce, from April 1956 to September 1959, operated seven Midas Muffler Shops in the up-state New York cities of Binghamton, Syracuse, Utica, Rome, Elmira and Mattydale.²⁴

Pre-Midas

Pierce was a lifetime resident of the Syracuse, New York, area and has been in business there for many years (2-5). Western Auto had a dealership program, and in 1937 Pierce opened one such store in Fulton, New York (4-5). He continued in this business until 1946, during which period he opened additional Western Auto stores in Oswego and Baldwinsville (5). J. C. Pierce, Inc., not the present corporate plaintiff, was formed in 1947, and thereafter Pierce added retail stores in Syracuse, Rome, Canastota, Cortland and North Syracuse (6-10). These stores handled many automotive and non-automotive products, including International brand exhaust systems, but Firestone tires were their major item (11-14). Pierce sold his retail stores in Canastota, Cortland and North Syracuse in 1951 and the store in Syracuse in 1952 (27-28). A fire destroyed the Baldwinsville store in 1960, so Pierce, through his separate non-party corporation, now operates retail stores only at Fulton and Rome (28).²⁵

²⁴ It is identified in para. 16(M) as Pierce Muffler Shops, Inc., formerly Midas Muffler Sales & Service, Inc. (C. 16)

²⁵ Throughout the subsequent period of Pierce's operation of Midas Muffler Shops, he sold International brand exhaust parts from these retail stores (47).

In 1954, J. C. Pierce, Inc. diversified and established a new division, Muffler Sales and Service (19). Pierce had prior experience installing mufflers and shocks at his retail stores and he then felt that "there was a future to the muffler installation business."²⁶ Exhaust systems which Pierce was then selling were purchased from International Parts, and he discussed with an International Parts representative "opening a specialized muffler installation shop, muffler, springs and shocks" (22). Assisted by the International Parts representative, Pierce found a suitable location in Binghamton for his first muffler shop (22).

Pierce expanded his muffler installation business in September 1955 by opening a second shop in Syracuse (29, 31) and a third shop in Utica; these three shops were then consolidated into a separate corporation, Muffler Sales and Service, Inc. (30-32). In April 1956 the corporate name was changed to Midas Muffler Sales and Service, Inc. (36-37) and subsequently changed to Pierce Muffler Shops, Inc. (19), the present plaintiff. This corporation is owned by the Pierce family. (50).

First Midas Franchise

Midas was first discussed by Pierce and an International Parts representative in February or March 1956, at which time Pierce visited a Midas Muffler Shop in Buffalo (38, 46) and discussed the Midas program with the shop owner (43-44). Pierce was informed that Midas Shops were to be opened in upstate New York and that existing purchasers from International Parts were to be given the first opportunity to obtain the new franchises (39). "So as not to

²⁶ Pierce's personal income for 1953 through 1955 was, respectively, \$20,028, \$17,977 and \$9,929 (Pierce's Interrogatory Answer XV). (R. 767)

invite competition," Pierce signed his first Midas franchise agreements on April 1, 1956, for the three existing Pierce Muffler Shops in Binghamton, Syracuse and Utica (39, 54-56, DX 46, 47 and 52).²⁷

Expansion in Midas

By June 1956, Pierce had opened his fourth Midas Shop, a second shop in Syracuse (36). His expansion continued, and by May 1957 he had obtained locations in Rome and Elmira and signed Midas franchise agreements for these two shops (36, DX 49 and DX 50). Sales by these shops had increased to such an extent by 1957 that Pierce opened a warehouse for his Midas operations in Syracuse (24-25). Without even asking defendants for another Midas franchise agreement, Pierce renewed his expansion in 1958 and opened his seventh Midas Shop, in Mattydale, a suburb of Syracuse (34, 36, 81).²⁸

Advertising and National Participation in Midas

Pierce's shops were identified by the "Midas Muffler Shop" signs (111). There were Midas display cards and advertising material at all locations (113-14). Like the other plaintiffs, Pierce used Midas advertising material in his local advertising. A typical TV script advised the

²⁷ Pierce acknowledged that he read the franchise agreements before signing them (134).

²⁸ On one occasion Pierce had a prospective Midas dealer at one of his shops and explained the Midas program to him and "told him I was enthused about it" (132). Later, Pierce brought a personal friend to defendants' headquarters in Chicago to inquire about a Midas franchise (91-92).

motorist to "depend on Midas for the world's finest mufflers, tailpipes and exhaust systems."²⁹

His involvement with the Midas concept was, like Ross and Skarupa, nationwide in that Pierce was also a member of the National Advisory Council (96).³⁰

Pierce's Threats of Termination

Pierce was unhappy with the reduction from 100% to 50% on the credit to the dealer on the guarantee, which became effective on January 1, 1959. After two months' experience under the revised credit program he wrote Gordon Sherman and formally complained about the additional expense (DX 53). After reciting his displeasure with the quality of the Midas muffler, Pierce alerted Sherman as to his future plans by threatening: "I am writing you in all fairness and stating my dissatisfaction with the present program. If I should decide to make a change in the future I would like this to go on record as to the reason why" (DX 53). Subsequently, he voiced the same opinion to Midas field counselors who called on him (184), and in one such conversation Pierce indicated that he was thinking of taking on a different brand of mufflers (S. 123).

²⁹ Pierce's local advertising expenditures and samples of other TV and radio scripts and newspaper mats are attached to Interrogatory Answer IV. All emphasized the Midas guarantee, the coast-to-coast service from exhaust specialists, and the Midas image of "clean, quick and courteous service." (R 628-92).

³⁰ The market for Pierce's Midas Shops was limited to the cities and counties in which they were located (Pierce's Interrogatory Answer V), and he was not in competition with other Midas dealers (334). (R 643)

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At various times throughout this period Pierce's Midas Shops sold and installed certain "allied automobile products" (121-23; 126-29). Although his practice of installing non-exhaust system parts was discouraged by the Midas field counselors, Pierce acknowledged that he was never threatened with termination of his franchises (319). During a personal conversation with Gordon Sherman, Pierce was told: "Joe, I will never tell you not to sell shocks and springs" (163). Pierce crystallized the field counselor's comments on his sale of non-exhaust system parts: "if I wouldn't [discontinue], there was not much he could do about it; all he could do was make his report" (160).

Using his Midas Muffler Shops as an outlet, Pierce began, in 1958 or 1959, to sell Nu-Era Mufflers from all his locations (152-53, 305, S. 134-35). Pierce acknowledged that he issued a guarantee on these mufflers that did not differ from the Midas guarantee and that he did not know whether the customer knew whether he received Pierce's guarantee or the Midas guarantee (153-54).

Termination of Pierce

About March 1959, Pierce was contacted by defendants' Chicago office after he placed a large order, and he was advised that the balance in his account was too high and that the shipment would be C.O.D. unless Pierce cleared up his account (240). In about June 1959, Pierce requested that his franchise on the Midas Shop in Elmira be terminated in order that he could operate independently and sell allied automobile products (198-99).

Midas executives, since the letter of February 25, 1959, had been concerned about Pierce's threat of cancellation and had also been aware of the large balance existing in Pierce's account (Dep. G. Sherman pp. 310-13). When the balance on Pierce's account had been reduced, defend-

ants exercised their right of termination by notice given on October 27, 1959 (Dep. G. Sherman p. 311, DX 55). Subsequently, Midas merchandise was returned to defendants by Pierce (225-26).

Post-Midas Experience

Following the termination of the Midas franchise agreements, Pierce was contacted by Herskee and offered the Robin Hood franchise program (352-53). Pierce was not interested in any franchise but agreed to purchase Arrow brand mufflers³¹ from Herskee on the understanding that no Robin Hood competition would enter Pierce's market area (353-54). Pierce changed his operation by advertising shocks, springs, and second-line mufflers (243), and by subsequently closing three of his former Midas shops. He closed his Rome shop in 1960, sold his North Syracuse shop in 1961, and closed his Binghamton shop in 1962 (246).

Midas Profits

A fiscal year ending on September 30 was employed by the Pierce corporation.³² Six months operation as a Midas dealer was included in the fiscal year ending September 1956, for which year Pierce had a gross profit of \$31,311, consisting of pretax corporate profits of \$17,269 and Pierce's personal wages from these operations, which does not include his wages from the J. C. Pierce, Inc., of \$14,042 (DX 164). For the next fiscal year, ending September

³¹ Pierce did not believe there was any difference between the Robin Hood brand and Arrow brand mufflers (355).

³² No separate financial statements on the individual Pierce shops are available (S. 113).

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1957, the comparable profit and wages were \$16,454 and \$12,000 for a total income of \$28,454 (DX 165). By September 1958, the pretax corporate profit had risen to \$26,778, and Pierce's personal wages had increased to \$33,985 (DX 166). To this 1958 profit an additional \$15,000 must be added as "a transfer of profit" to another of Pierce's corporations for a fiscal year total income of \$75,763.³³ Fiscal year ending September 1959, Pierce's last complete fiscal year as a Midas dealer, brought a total profit of \$45,619, consisting of a pretax corporate profit of \$27,919 and personal wage of \$17,700 (DX 170).

Profits of approximately \$180,000 resulted from Pierce's relationship with the Midas program, and by this action he seeks to recover an additional \$502,700, as requested in paragraph 41(M) of the Amended Complaint, or an additional \$1,305,826, as computed by his answer to Interrogatory II. (R. 155; R. 617-26)

Conspiracy Allegations

Pierce's knowledge of the alleged conspiracy was limited to the agreements between Midas, Inc. and the numerous Midas Muffler Shops and International Parts and the International dealers (284). All of the documents which he had relating to this claim were supplied to his attorneys (73-74).

IV.

CLAUDE D. WHEELER

Claude Wheeler, during the three-year period from September 1956 to November 1959 operated Midas Shops as a sole proprietor.³⁴ Two shops were located in St. Louis, Missouri and a third shop in East St. Louis, Illinois.

³³ Pierce Interrogatory Answer III. (R. 555)

³⁴ He is identified in para. 16(J) as Claude Wheeler, t/a Robin Hood Muffler Shops, formerly Midas Muffler Shops, an individual. (R. 16)

Pre-Midas

From 1943 to 1956, Wheeler resided in Gideon, Missouri, which is about 200 miles from St. Louis. At that time he was the proprietor of a pool room (3-6). His income from this venture during 1950 through 1955 averaged approximately \$5,900 per year.³⁵

First Midas Franchise

A Midas advertisement caught his attention in the summer of 1956, and Wheeler wrote defendants concerning the possibility of obtaining a Midas franchise (7-8). In August 1956 a representative of defendants visited Wheeler in Gideon, and Wheeler indicated an interest in a Midas Muffler Shop in St. Louis or Springfield, Missouri (8-10). The Midas merchandising methods were explained to Wheeler, including information as to the guarantee, an initial cost of \$5,000, physical and rent requirements for a shop, the national advertising program and the Midas dealer's 2% advertising surcharge (8-12). Wheeler was certain that the franchise agreement was discussed at this time (11, 16-17). At the conclusion of this meeting Wheeler was given some material explaining the Midas concept and was invited to visit defendants' offices in Chicago (8, 11).

About a week later Wheeler came to Chicago (12-14). He had no prior experience with exhaust systems and "wasn't too familiar with any type of a muffler" (7, 14), so he visited a Midas Shop in Hammond, Indiana, to observe, for the first time, the actual operation of a muffler installation shop (14-15). By the time Wheeler concluded

³⁵ Wheeler's Answer to Interrogatory XV attached Wheeler's federal tax returns for 1950 through 1953 and they state such income, respectively, as \$3,330, \$5,636, \$5,615 and \$6,250. DX 148 and DX 149, tax returns for 1954 and 1955 show, respectively, income of \$8,189 and \$6,684. (R. 534-75)

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his Chicago trip he had decided to go into the Midas program, and an appointment was made to have defendants assist in looking for a location in St. Louis (17-19).

A location was promptly selected (20), and Wheeler's first Midas franchise agreement, which he read before signing, was dated September 6, 1956 (28-29, DX 39). Shortly after he executed the franchise agreement, Wheeler made a second visit to the Midas Shop in Hammond, Indiana, and spent several days closely observing the operation "to learn to run a muffler shop" (30). In less than two months since his first exposure to Midas or to a muffler, his Midas Muffler Shop in St. Louis opened for business on September 29, 1956 (29).

Expansion in Midas

Although this first shop incurred a loss for 1956, having been open for only three months, Wheeler in early 1957 was "getting to learn the business" and "wanted to expand" since he did not want another Midas dealer to come into the market (67-68). Assisted by a Midas field counselor, a second location was decided upon, and by March 1957 Wheeler opened a second Midas Shop in St. Louis (68, 77).

With the second shop open and the first shop showing "substantial volume," Wheeler saw prospect of a third shop to be located in East St. Louis (85). A location search was undertaken by Wheeler and a Midas field counselor, and by July 1957 a suitable building was found (86). The franchise agreement for this Midas Shop was signed on July 12, 1957 (DX 41 and DX 42), and the third shop was opened in September (107), still less than a year since Wheeler opened his first shop.

One of Wheeler's St. Louis shops did not progress as he anticipated, and in late 1958 or early 1959 he decided that it should be moved to a different location (119-20).

The Midas field counselor suggested that a new shop be built (120), but Wheeler found an existing building in a location agreeable to defendants (124). During this period Wheeler was advised that another Midas dealer was going to be brought into the St. Louis area (134). Even though Wheeler objected to the prospect of potential competition, he proceeded to open the new shop in June 1959 (128, 134).³⁶

Advertising and National Participation in Midas

Wheeler's shops were identified by the "Midas Muffler Shop" sign, and he also had Midas literature displayed inside (38, 94-95). Midas' national advertising through magazines, radio, and television entered Wheeler's area (222). He supplemented this with local advertising, which emphasized "Midas" and the nationwide chain of shops.³⁷

Although his own market area was limited to St. Louis County and East St. Louis,³⁸ Wheeler became nationally involved in the Midas program, and near the end of 1957 he became a member of the National Advisory Council and served for a year (108). At a meeting of dealers, he spoke on the question of advertising (82).

Solicitation by Competitors and Abandonment of Midas

During the summer of 1958, a Maremont representative first explained the Robin Hood program to Wheeler, at which time Wheeler's reaction was that he "didn't care to go into it right at that time," but that he "would keep in

³⁶ Wheeler said that he refused to sign a Midas franchise agreement for this new location because it gave him *too small a territory* and restricted purchases of related products (128).

³⁷ Wheeler's Answer to Interrogatory IV attaches example of the Midas scripts and mats which he used. (R. 803 - 24)

³⁸ Wheeler's Answer to Interrogatory V. (R. 825)

contact" (155). In late 1958 or early 1959 Wheeler was again contacted by the original Robin Hood solicitor, who was then accompanied by Herskee (156). At a third solicitation, before Wheeler opened his third Midas Shop, he discussed with Herskee the critical issue, namely, that he "wanted to see what Midas was going to do with this new franchise" and whether Midas was going to bring in a new dealer (157). The proposed franchise from Robin Hood was for an exclusive right to the entire St. Louis and East St. Louis area (213-14). Another Robin Hood solicitation occurred after Wheeler's new Midas Shop opened, at which time Wheeler accepted an invitation to visit the Maremont factory in Chicago since he was thinking of changing from Midas (158). Shortly thereafter, on September 4, 1959, Wheeler advised Midas that his franchise agreements were terminated effective November 9, 1959 (DX 45). On September 24, Wheeler's new Robin Hood franchise was executed (DX 147).

Wheeler's Ultimatum Re His Midas Expansion

Upon defendants' receipt of the termination notice, Wheeler was immediately contacted by Midas' field counselors, but they were unsuccessful in attempting to persuade him to stay in the Midas program (140-41). A few days later Gordon Sherman came to St. Louis to confer, at which time Wheeler said that he was leaving the program because Midas was "bringing someone else into my territory" (178-79).³⁹ Wheeler told Sherman he would "stay in the program" if he received a 100% guarantee on returns (179). He also insisted that he be given "an

³⁹ Wheeler asserted that he first inquired as to an exclusive Midas franchise for St. Louis on his first trip to Chicago and was then advised that expansion depended "on how the shop operation went" (16).

exclusive franchise," and would even be willing to purchase the objectionable prospective Midas Shop in St. Louis from its owners (179).⁴⁰ Gordon Sherman would not agree to this ultimatum (179), and there was no further discussion between the parties (181). Wheeler sent "all of the Midas merchandise back to the factory for credit" (181).

Post-Midas Experience

As a Robin Hood dealer, Wheeler added selected "allied automobile products" in all three shops (184-85, 210-11) and purchased exhaust system parts from several manufacturers (153-54). Similar to Ross and Skarupa, he issued a personal guarantee on the Robin Hood muffler (171-72). Although Wheeler's Robin Hood franchise encompassed the large geographic area he sought from defendants,⁴¹ he closed one of his St. Louis shops in January 1961 (137-38), and he did not open any additional shops (214).

Like the other plaintiffs, Wheeler's post-Midas experience was remarkably unsuccessful when compared to his financial success with Midas. In 1960, Wheeler incorporated his two Robin Hood shops in St. Louis, and by the end of that year these corporations had a net operating loss of \$13,320 (DX 143), with the East St. Louis shop having a

⁴⁰ Wheeler acknowledged that other Midas dealers did not then compete with him (S 238).

⁴¹ As described in Wheeler's Robin Hood franchise agreement, the area included somewhat more than the eastern one-third of Missouri, with St. Louis on the east and Columbia and Jefferson City on the west, and the southwest portion of Illinois, from Alton to Cairo, including all of the area around East St. Louis, and with the addition of Quincy, on the Illinois-Missouri border (DX 147).

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net profit of \$6,051 (DX 145). In 1961, Wheeler again operated at a loss, the St. Louis corporate operations losing \$8,016 (DX 144), and the profit from the East St. Louis proprietorship being reduced to \$2,789 (DX 146). By the end of 1961, Wheeler had closed one of his shops (137), and he was in the same financial position as he had been in the early 1950s when he operated the pool hall.

Midas Profits

Wheeler had operated under the Midas franchise and the Midas merchandise methods during part of 1956, all of 1957 and 1958, and substantially all of 1959. His personal investment in these three Midas Shops was estimated at \$30,000 (121, 263). In 1957, Wheeler's participation in the Midas program brought him a personal income of \$29,920 (DX 133, 134, 135 and 151), even though two of his shops had been opened during that year. For 1958 his income had risen to \$34,562 (DX 136, 137, 138 and 152), even though the East St. Louis shop had been closed by a labor strike for a month during that year (97). For 1959 there are no financial statements that reflect the Midas portion of the year, that is, through November 9 (S. 95); however, the entire year, including the expenses attributed to the change-over from Midas to Robin Hood, brought a profit of \$34,034 (DX 139, 140, 141, 142 and 153).

To the almost \$100,000 in personal profits during his three years with Midas, Wheeler now seeks to add \$439,544.06.⁴²

⁴² The damages claimed in Wheeler's Answer to Interrogatory II. (R. 792-801)

Conspiracy Allegations

As with all of the plaintiffs, Wheeler produced every document he had relating to the alleged conspiracy (55). None of these documents support his claim.

Respectfully submitted,

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Counsel for Defendants

7 Dated: October 18, 1965

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**EXHIBIT A TO DEFENDANTS'
REPLY BRIEF TO PLAINTIFFS'
OPPOSITION TO MOTION FOR
SUMMARY JUDGMENT**

United States Patent Office

620,322
Registered Jan. 31, 1956

PRINCIPAL REGISTER

Trademark

Ser. No. 683,396, filed Mar. 14, 1955

MIDAS

**International Parts Corp.
(Illinois corporation)
1021 S. State St.
Chicago, Ill.**

**For: MUFFLERS FOR INTERNAL
COMBUSTION ENGINES AND PARTS
THEREOF—NAMELY, TAIL PIPES, EX-
HAUST PIPES, AND MUFFLER CLAMPS
—in CLASS 23.**

**First used Mar. 9, 1955; in commerce
Mar. 9, 1955.**

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**EXHIBIT B TO DEFENDANTS'
REPLY BRIEF TO PLAINTIFFS'
OPPOSITION TO MOTION FOR
SUMMARY JUDGMENT**

United States Patent Office

655,853
Registered Dec. 3, 1957

PRINCIPAL REGISTER
Service Mark

Ser. No: 8,010, filed May 9, 1956

MIDAS

Midas, Inc. (Illinois corporation)
1021 S. State St.
Chicago, Ill.

**FOR: INSPECTION OF AUTOMOTIVE
EXHAUST SYSTEMS AND INSTALLA-
TION OF AUTOMOTIVE MUFFLERS
AND EXHAUST SYSTEM PARTS, in
CLASS 103.**

**First use Nov. 15, 1955; in commerce Nov.
15, 1955.**

Owner of Reg. No. 620,322.

1401 IN THE DISTRICT COURT OF THE UNITED STATES

• • (Caption—No. 60 C 1636) • •

(Filed February 25, 1966)

MEMORANDUM OPINION

Motion of defendants for summary judgment.

This is a three-count antitrust action arising under Section 1 of the Sherman Anti-Trust Act (Sec. 1, Title 15, U. S. C.), Section 3 of the Clayton Act (Sec. 14, Title 15, U. S. C.) and Section 2 of the Clayton Act as amended by the Robinson-Patman Act (Sec. 13, Title 15, U. S. C.) In essence, the complainants charge in Counts I and II that the terms of certain franchise agreements executed by the parties herein to govern their relationship in the purchase and sale of automotive exhaust systems parts through establishments displaying defendants' trade and service marks, ("Midas" and 1402 "Midas Muffler Shop") illegally restricted plaintiffs in the operation of said shops. It is thus alleged that the corporate and individual defendants herein joined in an illegal conspiracy to restrain trade in violation of Section 1 of the Sherman Act, and have further violated the terms of Section 3 of the Clayton Act. Finally, in Count III, it is asserted that defendants violated Section 2 of the Clayton Act as amended by the Robinson-Patman Act, by granting discriminations in price and service to certain of their customers without offering or otherwise making available these same prices and services to plaintiffs herein.

Defendants have moved for summary judgment on all counts. Plaintiffs have opposed said requests, and in addition, have moved to strike portions of that motion.

In accordance with our earlier decisions in *Rayco Mfg. Co. v. Dunn*, (D. C. Ill., 1964), 234 F. Supp. 593, and *Crest Auto Supplies v. Ero Mfg. Co.*, (D. C. Ill., 1965), 246 F. Supp. 224, we must grant summary judgment in favor of defendants on Counts I and II. We have consistently held that a litigant cannot be heard to complain of injuries which resulted from alleged anti-trust violations to which it was a *voluntary* party. We find no cause to alter that principle today.

It is clear from the undisputed facts before us that each plaintiff voluntarily entered into the franchise agreement at issue and accepted the benefits therefrom. They are, under the holdings in *Rayco* and *Crest*, *in pari delicto* with defendants, and therefore unable to reap the harvest of their own misdeeds. Each plaintiff recognized that the franchise conveyed to him the right to use the various Midas trade names, trademarks and service marks, and each profited from the use of same. They are not now entitled to the high profit of a treble damage suit when they voluntarily acceded to, fostered, and profited from the very practice about which they now complain.

While defendants may well be liable to third parties for antitrust violations, plaintiffs, having participated in the alleged illegal undertaking, may not recover. See *Northwestern Oil Co. v. Socony-Vacuum Oil Co.*, (7th Cir., 1943) 138 F. 2d 967, 971; *Pa. Water & Power Co. v. Consolidated Gas, Elec., Light & Power Co.*, (4th Cir., 1953), 209 F. 2d 131, *cert. den.* 347 U. S. 960; *Kershaw v. Kershaw Mfg. Co.*, (D. C. Ala., 1962) 209 F. Supp. 447, 454, *affd.* (5th Cir., 1964) 327 F. 2d 1002.

Plaintiffs' cases in rebuttal may all be distinguished. In *Ring v. Spina*, (2d Cir., 1945) 148 F. 2d 647, *Mande-*

ville Island Farms, Inc. v. American Crystal Sugar Co., 334 U. S. 219 (1961); *Bales v. K. C. Star*, (8th Cir., 1964) 336 F. 2d 439; *Emich Motors Corp., et al. v. General Motors Corp.*, 340 U. S. 558 (1951); *Lessig v. Tidewater Oil Co.*, (9th Cir., 1964) 327 F. 2d 459, *cert. den.* 377 U. S. 993 (1965); and *Osborn v. Sinclair Refinishing Co.*, (4th Cir., 1960) 286 F. 2d 832; the plaintiffs all entered into agreements as "a result of coercion," "in a context of coercion," or because of "coercive conduct on the part of respondents."

In *Rayco*, *Crest*, and, *a fortiori*, in the instant case, there has been no showing whatsoever of coercion, economic or otherwise. The depositions of the individual plaintiffs, quoted from in defendants' brief, and uncontraverted except by counsel's arguments, reveal that 1405 each plaintiff signed franchise agreements freely and voluntarily "as a way of making some real money." (Ross, Dep. pp. 238-240); "So I could reap the benefits of such development," (Skarupa Dep. p. 30); "so as not to invite competition," (Pierce, Defendants' App. 19); because "I was looking for something to get into . . ." I answered the ad," (Wheeler Dep. p. 7). It is further undisputed from the record before us that each plaintiff sought to expand his market area after initially gaining a franchise, sought to obtain additional franchises thereafter, and sought to create a monopoly for themselves and defendants within specified territorial limits. Further, each plaintiff retained ownership or control of the premises at which his muffler shop was located, paid no franchise fee to defendants, and was able to terminate the agreement unilaterally on thirty days' notice. Under no circumstances could "coercion" be said to have been a factor herein.

The remainder of plaintiffs' cases were distinguished previously in our earlier opinions on the ground that the

only defense relied on therein was "unclean hands." 1406 That is, in the cited cases the mere fact that a plaintiff had himself violated the antitrust laws, independently of defendant, did not suffice to bar maintenance of the suits. However, when that violation is in conjunction with defendant, as here, plaintiff is a party to the illegal arrangement complained of, is *in pari delicto* with defendant, and may not invoke the aid of the law. See *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U. S. 211, (1951); *Moore v. Mead Service Co.*, 340 U. S. 941 (1951); *Trebuhs Realty Co. v. News Syndicate Co.*, (D. C. N. Y., 1952) 107 F. Supp. 595. J

We have repeatedly held that a person who freely assents to an act suffers "no legal injury" if harm results therefrom. We are thus satisfied on the papers presented to us that no genuine factual controversy exists, and that defendant is entitled to summary judgment as a matter of law on Counts I and II.

While we need not base our decision thereon in view of the foregoing discussion, we further hold from the undisputed facts before us (contested inadequately under

Rule 56 by Counsel's briefed arguments alone) that 1407 the corporate and individual defendants were a single business entity through which a family business was operated, and that, therefore, as a matter of law, no conspiracy existed among them in violation of Section 1 of the Sherman Act.

It is clear from the Complaint that each individual defendant is alleged to be "an officer and/or employee and/or agent of one or more of the corporate defendants (Para. 10, Amended Complaint), and that each corporation is alleged to be a "wholly-owned subsidiary" of International Parts (Para. 11). It is equally clear that the J

acts of a corporation's agents are in law the acts of the corporation, that a corporation cannot act except through its agents, and that a corporation cannot conspire with itself. Accordingly, each individual defendant when acting as a corporate agent in his normal employment capacity, could not be involved in a conspiracy with the other individual defendants or the corporation itself. *Nelson Radio & Supply Co. v. Motorola* (5th Cir., 1952) 200 F.2d 911, 914:

"Surely discussions among those engaged in the management, direction, and control of a corporation 1408 . . . do not result in the corporation being engaged in a conspiracy in unlawful restraint of trade under the Sherman Act."

There is no indication that the acts of the individual defendants herein were otherwise. Further it is apparent that the multiple corporations before us constituted in fact a single corporation. While we agree with plaintiff that subsidiary corporations may under certain circumstances "conspire" to violate the antitrust laws, the record before us indicates by uncontested facts that no such conspiracy was present here.

The affidavits of Nathan Sherman and Gordon Sherman, chief executives of the defendant corporations, reveal that the manufacture and sale of exhaust system parts at issue, while operated through a multi-corporate structure, was a single business entity. That is, International Parts sold all the products involved herein. Midas, Inc., acted as a corporate shell owning all trade names, trademarks, service marks and franchise agreements. Muffler Corp. of America handled manufacturing for its parent, and Powell Muffler Co., served 1409 as a distributing subsidiary.

There is no evidence, except in plaintiffs' unsupported arguments that these corporations competed with

each other or acted in any manner other than as a single integrated business. There are no acts alleged which could not have been done by a single corporation acting alone. Plaintiffs may not by mere pleading allegations and conclusions fragmentize a unified business to meet the conspiracy requirements of the Sherman Act.

Inasmuch as plaintiffs have failed to counter the joint affidavit of Nathan and Gordon Sherman, or the depositions of the plaintiffs indicating that they have no knowledge of facts to support the conspiracy allegations of the Complaint, we must grant summary judgment as to the Sherman Act allegations on this ground as well.

Defendants finally assert that summary judgment should be granted on Counts I and II because the franchise agreement and the merchandising methods employed by defendant in connection therewith were reasonable and

legal means to protect the Mida's trade names, trade-1410 marks and service marks licensed to plaintiffs, and

on Count III because there were no discriminations in price or service between plaintiffs and other purchasers in the absence of requisite competition between purchasers, and the requisite identity of commodities of like grade and quality.

Plaintiffs have moved to strike these arguments on the grounds that defendants have refused discovery as to the factual data underlying the trade and service marks which they now seek to use in support of their summary judgment motion. More specifically, it is alleged that defendants, having objected to answering plaintiffs' Interrogatory No. 34, dealing with certain trademarks owned by defendant, and having prevailed on the Court to sustain said objection on the ground that trademarks were not relevant to this action, cannot now rely on a trademark defense in their motion for summary judgment.

We must sustain plaintiffs' motion. While the significance of defendants' trademarks relating to automotive exhaust systems was most speculative on December 18, 1964, when this Court sustained defendants' objections, it is apparent now that plaintiffs are entitled to discovery thereon. Summary judgment is a strong remedy, to be applied with great restraint only upon a clear showing that no material facts are in genuine controversy. Where a party has been denied discovery in what later appears to be a critical area, especially on defendants' representation that said area is irrelevant, it cannot be said that the facts have been sufficiently developed to merit summary judgment consideration.

We shall therefore deny summary judgment on Count III of the Complaint at this juncture, without prejudice, require defendants to answer Interrogatory 34(a), (b) and (c) dealing with automotive exhaust parts, within ten days, and permit defendants, if they so desire, to refile the instant motion thereafter. It must be noted, however, that the foregoing does not in any way affect the judgment we have this day ordered in favor of defendants on Counts I and II.

ENTER:

Abraham L. Marovitz,
Judge.

Dated: February 25, 1966.

1414 IN THE DISTRICT COURT OF THE UNITED STATES
 • • (Caption—No. 60 C 1636) • • •

ORDER

This Cause coming on to be heard on the defendants' motion for summary judgment filed herein on October 18, 1965, and plaintiffs' motion to strike portions of the said defendants' motion filed herein on January 5, 1966, briefs having been submitted by the parties; the Court having filed its Memorandum Opinion on February 25, 1966; and the Court being fully advised in the premises it is hereby Ordered, Adjudged and Decreed as follows:

1. Defendants' motion for summary judgment with respect to Counts One and Two of the Amended Complaint be and it is hereby sustained and said Counts One and Two are hereby dismissed with prejudice.

2. Defendants' motion for summary judgment as to Count Three of the Amended Complaint is hereby denied and without prejudice and said motion may be re-filed at any time after defendants comply with the 1415 following subparagraph.

3. Defendants, on or prior to March 10, 1966, shall file with the Court and serve on counsel for plaintiffs Answers to Plaintiffs' Interrogatory 34(a), (b), and (e), which interrogatory was filed herein on October 22, 1961.

ENTER

Abraham L. Marovitz
 Judge

Satisfactory as to form:

.....
 Attorney for Plaintiffs
 Glenn W. McGee
 Attorney for Defendants

March 2, 1966

1494 IN THE DISTRICT COURT OF THE UNITED STATES

• • (Caption—No. 60 C 1636) • •

(Filed May 20, 1966)

MEMORANDUM OPINION

Defendants' Motion for Summary Judgment on Count III.

This is a three-count action arising under the anti-trust laws of the United States. In essence, the complainants charge in Counts I and II that the terms of certain franchise agreements executed by the parties herein to govern their relationship in the purchase and sale of automotive exhaust system parts through establishments displaying defendants' trade and service marks ("Midas" and "Midas Muffler Shop"), illegally restricted plaintiffs in the operation of said shops. It is thus alleged that the corporate and individual defendants herein joined in an illegal conspiracy to restrain trade in violation of Section 1 of the Sherman Act, and have further violated the terms of Section 3 of the Clayton Act. In Count III, it is asserted that defendants violated Section 2 of the Clayton 1495 Act, as amended by the Robinson-Patman Act, by granting discriminations in price and service to certain of their customers without offering or otherwise making available those same prices and services to plaintiffs herein.

On February 25, 1966, this Court granted defendants' motion for summary judgment on Counts I and II, holding that, in the absence of coercion, plaintiffs were *in pari delicto* with defendants, and, thus, unable to maintain the instant action. At the same time we postponed ruling with regard to Count III on plaintiffs' assertion

that interrogatories calling for information relevant to the issues raised therein were objected to by defendants and not answered. The defendants having now supplied the requested information, we may proceed to consideration of defendants' motion.

In support of its motion for summary judgment on Count III, defendants assert that any alleged difference in price or service between purchases by plaintiff of Midas brand exhaust parts and purchases by other persons of Midas or International brand parts from defendant did not constitute a discrimination violative of the Robinson-Patman Act, in that (a) plaintiffs did not compete with other purchasers of Midas brand parts; (b) plaintiffs had the opportunity to purchase either brand; and (c) the Midas exhaust parts system was unlike the Inter-1496 national system in grade and quality.

Taking the alleged *intra*-brand discrimination first, i.e. sale of Midas parts to Midas dealers at prices lower than those charged plaintiff for Midas parts, it is clear, under Section 2(a) of the Robinson-Patman Act (Sec. 13, Title 15, U. S. C.) that said statutory provisions apply only where the alleged discrimination is between *competitors*. *Bales v. K. C. Star Co.*, (8th Cir., 1964) 336 F. 2d 439; *National Lead Co. v. F. T. C.*, (7th Cir., 1955) 227 F. 2d 825, 836; *Borden Co. v. F. T. C.*, (7th Cir., 1964) 339 F. 2d 953, 956. Indeed, the late Judge Julius Miner of this Court, on October 16, 1961, ordered plaintiffs herein to amend their complaint so as to properly allege competition with the favored purchasers. Without such allegations, Judge Miner concluded, the complaint was legally insufficient.

Having reviewed the depositions, affidavits, and documents submitted herein, we must hold that no real controversy exists as to the factual elements of this issue,

and that defendants are entitled to summary judgment thereon as a matter of law. That is, each plaintiff has admitted that the geographic "marketing area" in which he sold his Midas products was the "city or county" in which each shop was located, and that no other Midas dealers were located within that region of competition. (Skarupa, Int. V; Skarupa Dep. pp. 187-88, 302-03; Ross Int. V; Ross Dep. pp. 278-79; Pierce, Int. V; Pierce Dep. p. 334; Wheeler, Int. V; Wheeler Supp. Dep., p. 238; Ross Dep. pp. 402-03.) Thus, it is clear from plaintiffs' own testimony that none of the alleged favored purchasers of Midas brand products operated in or near the marketing area controlled by plaintiffs' shops, and that none of said purchasers were ever in competition with plaintiffs.

Plaintiffs have apparently elected not to contest these facts by affidavit or deposition testimony. Rather they seek to defeat defendant's motion for summary judgment by asserting that competition existed between International Parts dealers and plaintiffs, and, that, indeed, there was no difference in grade or quality between the International muffler and the Midas muffler. While this argument is relevant with regard to the second portion of defendants' motion which concerns "inter-brand" discrimination i.e. sale of International brand systems to purchasers at prices more favorable than those extended to plaintiffs in their purchase of Midas products, to be discussed *infra*, it does not contradict defendants' initial contention in any way. That is, defendants have demonstrated that no material fact remains in controversy with regard to intra-brand discrimination between Midas dealers, and that judgment on that issue should be entered in their favor as a matter of law. Accordingly, summary judgment is granted on Paragraphs 24, 24A and 25 of the Amended Complaint, which para-

graphs deal exclusively with the discriminatory sale of Midas parts alone.

We must then turn to Paragraphs 26 through 31 of the Amended Complaint, in which are alleged facts supporting the remainder of Count III. In said paragraphs, plaintiffs contend that price and service discriminations existed between plaintiffs and purchasers of International products. In defense thereto, and in support of their motion for summary judgment, defendants contend that both Midas and International Brand Products were freely available to plaintiffs at the prices offered others, and that a price differential between the two products was justified by an existing dissimilarity in grade and quality. These two assertions, if proven, would constitute a complete defense to the Section 2(a) allegations at issue.

As the Court of Appeals for the Ninth Circuit stated in *Tri-Valley Packing Assn. v. F. T. C.*, (9th Cir., (1964) 329 F. 2d 694, at pp. 703-04, "if the lower price would have been available to the nonfavored buyer . . . the probability of competitive injury due to the fact that the nonfavored buyer paid more . . . is not the result of price discrimination, but of the nonfavored buyer's 1499 failure to take advantage of the opportunity, equally available to him, of buying at the same low prices."

Thus, assuming for the purpose of argument that the International Brand parts were identical to the Midas parts, there could be no discrimination within the meaning of Section 2(a), if plaintiffs were able to purchase the former at the lower price, but elected to pay higher prices for the latter. See also *United Banana Co. v. United Fruit Co.*, 1965 Trade Cases Par. 71,522 (D. C. Conn.).

The uncontroverted deposition testimony of plaintiffs clearly demonstrates that prior to the introduction of

the Midas program, plaintiffs Ross (Dep. pp. 7, 8, 10, 14, 21, 24, 229-230), Skarupa (Dep. pp. 29, 293) and Pierce (Dep. pp. 11-14, 19, 22) purchased International parts from defendants, and that, indeed, one of them, Pierce, continued to sell such parts from his retail stores during his operation of Midas shops (Dep. p. 47).

While plaintiffs' counsel baldly asserts that plaintiffs could only buy Midas products, it is clear that on a motion for summary judgment, such unsupported contentions cannot effectively refute the sworn deposition testimony of plaintiffs themselves. As our discussion with regard to the coercion issue present in Counts I and II demonstrated, the evidence is clear and uncontroverted that plaintiffs herein freely elected to sell Midas parts. Whether they were influenced by the guarantee thereon, the "free installation" approach, or the national advertising program is not crucial. What is important, however, is that plaintiffs, well aware of any price differentials that might exist between the two brands, having dealt with International previously, and in one instance having continued to do so, *freely* chose to forego purchases of International parts and to deal exclusively with Midas. They cannot now, with the wisdom of hindsight, declare that they would have done better with International Parts purchases. The evidence is uncontroverted in demonstrating that plaintiffs were free to purchase either product, but chose Midas. No discrimination in a legal sense is present, and defendants are entitled to summary judgment.

Finally, we are convinced that the Midas parts were sufficiently dissimilar in grade and quality from International products so as to justify a price differential under the terms of Section 2(a).

While we are fully aware of the recent holding of the United States Supreme Court in *Borden Co. v. F. T. C.*,

(dec. March 23, 1966) 34 U. S. L. Week, reversing the Fifth Circuit Court of Appeals (339 F. 2d 133), and holding that a difference in grade and quality cannot be established "by a label alone or by the label and its 1501 consumer appeal," we are equally satisfied that the facts before us are not that narrow. In addition to an undisputed physical difference existing between the two mufflers after January 1, 1959, the uncontroverted facts clearly reveal that the Midas product included in its purchase price a unique lifetime guarantee by the manufacturer, not attached to the International commodity. (See defendants' Answer to Interrogatory 10 for provisions thereof.) Such a guarantee, in the opinion of this Court, clearly justifies a differential in price, and with equal clarity, constitutes a dissimilarity in grade and quality.

While we could not preclude plaintiffs from discovery they considered crucially relevant before ruling on defendants' Count III motion, we are satisfied now that Midas trademarks and their validity are irrelevant to the issues raised herein.

Accordingly, the location of defendants for summary judgment in their favor on Count III is granted.

ENTER:

Abraham L. Marovitz
Judge

Dated: May 20, 1966

1502 IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—No. 60 C 1636) * *

FINAL JUDGMENT OF DISMISSAL

This Cause coming on to be heard on the defendants' motion for summary judgment filed herein on October 18, 1965, and the defendants' renewed motion for summary judgment filed herein on March 11, 1966; the Court having filed its Memorandum Opinion on February 25, 1966, and entered its Order on March 2, 1966 sustaining defendants' motion for summary judgment with respect to Counts One and Two of the amended complaint and dismissing with prejudice said Counts One and Two; briefs having been submitted by the parties; the Court having filed its Memorandum Opinion with respect to said renewed motion on May 20, 1966; and the Court being fully advised in the premises it is hereby Ordered, Adjudged and Decreed as follows:

1503 1. Defendants' renewed motion for summary judgment with respect to Count Three of the amended complaint be and it is hereby sustained and Count Three is hereby dismissed with prejudice.

2. The complaint filed herein, as amended, be and it is hereby dismissed with prejudice.

ENTER

Abraham L. Marovitz

Judge, U. S. District Court

Dated: May 24, 1966.

IN THE DISTRICT COURT OF THE UNITED STATES

• • (Caption—No. 60 C 1636) • •

DEPOSITION OF JOSEPH PIERCE

13 Q. What brands of automotive parts in addition to Firestone did you carry?

A. So many of them, I have to stop and think. You mean each particular item we handled?

Q. Yes, sir.

A. We had Champion sparkplugs, A. C. sparkplugs, Delco batteries, Motorola car radios, Hastings piston rings, Trico wipers, International shock absorbers, International mufflers, Kemtone house paint, DuPont polishes and cleaners, G. E. automobile bulbs, Howard Zink seat covers, Firestone seat covers, Firestone batteries and Firestone tires.

19 Q. Did you have prior experience?

A. Binghamton, New York as Muffler Sales and Service, Division of J. C. Pierce, Inc.

Q. When had you set up that division?

A. 1954.

Q. Was there any particular reason for this action at that time?

A. Yes, sir.

Q. Would you explain it to us?

A. Yes, sir. Previous to 1954, we were installing mufflers and shocks at the locations that we had service facilities at the J. C. Pierce, Inc. stores, and our
20 experience proved that there was a future to the muffler installation business, and I proceeded to look for a location and Binghamton, New York was the first one available in 1954, to install mufflers and shocks and springs.

21 Q. When you started this operation as a division, what brand mufflers were you selling?

A. International.

Q. The same for shocks and springs?

A. International shocks and Vulcan springs.

38 Q. With whom did you first discuss the Midas brand?

A. Charles Lichterman.

Q. Remember when that discussion took place?

A. It was prior to April 1, 1956.

Q. Was it in 1956?

A. Yes, sir, to the best of my recollection, it was.

Q. Do you recall the substance of that discussion?

A. Yes, sir. Mr. Lichterman called on me. We sat in my office and he presented me with this Midas franchise. I told him I wasn't interested in it. Because of my experience with franchises in the past, I told him I was satisfied to operate as an independent operator.

In the meantime, prior to this, Mr. Lichterman and I made a trip to Buffalo, New York to look at other muffler installation shops that were operating. We called on the International shop in Buffalo, New York, Kar-Muffler, and also the Midas Muffler Shop in Buffalo, New York operated by Lou Gristina and a partner; I don't know the man's name.

39 Q. C-r-i-s-t-i-n-a?

A. -a-n-a or i-n-a. To the best of my recollection, these shops were operating prior to Mr. Lichterman presenting me with this franchise.

Subsequently, I inquired of Mr. Lichterman as to why the International Muffler Installation Shop did not take on the Midas franchise.

He told me that they had the opportunity, they were offered the franchise previous to the Midas installation, and they turned it down.

After the Midas installations were installed, Kar-Muffler objected to the competition from the same supplier. The answer to that was that they were offered the Midas franchises previous to these new dealers being franchised. In effect, the same thing could happen to me; if I didn't take on the Midas franchise, that I was open to competition from a Midas Muffler Shop, and that International mufflers were to be sold through other dealers, through dealers other than installation shops.

So as not to invite competition, I signed the franchise. At this time, I want to go on record that I was handling mufflers, shocks and springs, and that there were no objections to me handling these items at the time I signed these franchises. This, in effect, excluded me from
40 handling other name brands of mufflers.

• • • • •
45 Q. And what was the substance of the conversation, if any, which you had with him about Midas on the way back?

A. Well, I was curious to know why Kar-Muffler, having two successful International operations, was subjected to competition from their own supplier, and it was explained to me by Mr. Lichterman that they had the opportunity to take on the Midas franchise, and when they turned it down, they left the territory wide open for Midas Muffler Shops, and the same thing would apply

to me or any other territory where there was an International installation shop.

.

55 Q. I believe you said there was also a muffler shop operated by you in Mattydale.

A. Mattydale.

Q. Mattydale?

A. Yes, sir.

Q. Apparently there never was a franchise executed in connection with that location?

A. That is right, sir.

.

80 Q. I think we have established before, Mr. Pierce, that for the Mattydale location there was no License and Sales Agreement. Was that location operated as a Midas Muffler Shop?

A. It was.

Q. And how did you work that out?

A. Well, I opened the shop in the suburb of Syracuse, a small shop, and the Midas representative and myself worked together on it. Nothing was ever said about a franchise, but at a later date Mr. Gordon Sherman, when on a visit to Syracuse, looked the operation over and he approved of it, verbally.

Q. Did you ever request a franchise for that location?

81 A. No, I did not.

.

105 Q. Did Mr. Lichterman indicate to you any of the
106 advantages that he thought you could obtain from the
Midas program?

A. Other than the national advertising and the possibility of competition there were no advantages at that time, because we were operating successfully as an independent muffler installation shop.

Q. Did you indicate to him or to anyone else that you were entering into these franchises under protest?

A. Only at the time I discussed it with Mr. Lichterman, earlier or previous to the date we signed these franchises.

Q. After you had been in the program did you ever indicate to anyone representing Midas or International that you had entered into the program under protest?

A. No, sir.

. . .

130 Q. During the time you were with the Midas program, did you request permission to open any other locations?

A. Other than these?

Q. Other than these seven which we have talked about?

A. Yes, in Rochester, New York.

Q. Any place else?

A. Albany, New York. That's about all.

Q. Those two?

A. That's about it, yes.

Q. Do you recall the time and to whom you directed
131 the request as to Rochester?

A. Yes, sir, this was in '56 and the request was directed to Mr. Charles Lichterman.

Q. About what time of the year '56?

A. Oh, I would say approximately the middle of the year.

Q. Was it after you had started with the Midas program?

A. Yes, sir.

Q. What led up to this conversation?

A. Well, at that time, we had three shops: Syracuse, Utica and Binghamton, and I was looking for locations for others, and Mr. Lichterman and I drove to Rochester and also to Albany to look for a location.

Q. Did you find any?

A. We were not successful in Albany, but we looked at a location in Rochester and made a lease offer which was not accepted.

Q. Did that end the search then for—

A. I continued to look for locations through a real estate man.

Q. Did you ever find a location and have your request to open a Midas shop at that location refused by Midas?

A. No, sir. In the meantime, these locations had—prospective dealers were found for these two locations.
132 In fact, John Kiskas came into my shop and I explained the program to him. I told him I was enthused about it and he seemed to like it, so eventually, he became a Midas dealer.

169 Q. Did you discuss this with Mr. Lichterman at the time you signed the first franchise?

A. I did,

170 Q. What did he say?

A. I told him that this paragraph that restricted me from selling nothing but exhaust muffler parts was just impossible for me to abide with, because I had shocks and springs for sale in my place of business, and I liked it. It was a very profitable part of my business, and I did not intend to discontinue the sale of them, and he said I wouldn't have to.

.

172 Q. Did you participate in the discussion of the guarantee?

A. No, sir—in the discussion?

Q. Yes, sir.

A. Of the guarantee?

Q. Yes.

A. I don't think we had any opportunity to discuss the guarantee. We were told that the guarantee was changed to a 50-50 basis, period.

Q. Isn't it a fact that at that meeting, Mr. Gordon Sherman announced the policy and then asked the National Advisory Council to discuss it among themselves?

A. Yes.

Q. Didn't you do that?

A. We did but—

Q. What was the substance of that discussion?

A. Well, naturally, the dealers were dissatisfied with the new policy on guarantee, and I discussed with the Advisory Council, I said, "If you fellows feel that way about it, why don't we say something about it, sit down and say something about it."

When we sat down, we didn't have an opportunity
173 to say anything about it. It was just passed over like that. In other words, that was the new policy,

and Mr. Gordon Sherman made up his mind it was a 50-50 basis and, obviously, it was useless to discuss it.

183 Q. Did you have any further discussion about this guarantee problem following this exchange of correspondence?

A. Verbally with the Midas counselors. I was led to believe, along with other dealers, at the first meeting which was after we signed this contract, that the guarantee was changed to 100 percent. I read this clause before that and I knew what it meant, but at this meeting, there was a change. The dealers were told that it was a 100 percent guarantee.

Q. That was the March '57 meeting?

A. That's right, but the contracts were not changed to that effect.

Q. My question was whether after this exchange of correspondence in February '59, whether you had any
184 further conversations concerning the guarantee problem?

A. If I did, I only discussed it with the field counselor and voiced my opinion the same as I did in this letter.

Q. You continued to purchase Midas merchandise after this exchange of correspondence?

A. I had no choice.

Q. And did you continue to honor the guarantees?

A. I did. I had invested over \$150,000. advertising this product. I had no choice as to whether I could discontinue it or keep it.

222 Q. Did you make any changes in any of your locations during that first year after leaving Midas with respect to personnel?

A. Nothing; no, I don't think so.

223 Q. Did you change the physical facilities in any way other than to change the signs and that type of thing?

A. No, with the exception of the new shop that we set up.

300 Q. At any time has any representative of Powell or International refused an order by you of Powell brand goods?

A. No, sir.

MR. MILLER: Off the record.

(A discussion was had off the record.)

MR. McGEE: Q. One question that I think was asked before which I can't remember the answer, and that is whether J. C. Pierce, Inc. continued to sell International brand products after you became a Midas dealer?

A. We did.

Q. And did they ever cease selling International brand products?

A. No, we still have some; and we purchased, oh, not a great quantity, but up until the present time.

315 Q. Calling your attention then to Sub-Paragraph (N) on Page 17 which states that plaintiffs were consistently required to purchase the full line of automotive exhaust parts offered by the defendant.

Do you know what the words "full line" mean in that instance?

A. I do.

Q. Would you explain it for us, please?

A. Mufflers, tailpipes, exhaust pipes, clamps, hangers, the Hollywood-type mufflers and related items.

Q. Was there any occasion on which you requested permission to carry a partial line of automotive exhaust parts?

A. Other than second-line mufflers, that is the only occasion I requested handling that.

Q. Well, calling your attention to Sub-Paragraph 316 (O) on Page 17 which says, among other things, that

defendant Midas threatened to terminate the agreements with contractees including plaintiffs in the event they purchased, et cetera, automotive exhaust parts from sources of supply other than Midas, or in the event that they purchased or serviced allied automobile products.

Have you detailed for us each occasion on which you were threatened with termination of your agreement because of these reasons?

A. Well, I was consistently threatened by the field counselors to discontinue the sale of other than exhaust parts.

Q. Did any field counselor say that your contract would be terminated if you did not cease to carry shocks or springs?

A. Well, I interpret the word "threaten" to mean that they would consistently come in and tell me that I shouldn't handle these exhaust parts, it was against the franchise, and that if I didn't cease selling these items that my contract could be cancelled.

Q. They would actually use those terms, your "contract could be cancelled"?

A. Yes, sure.

317 Q. Did they ever say your contract would be cancelled?

A. I don't remember if that was said or not.

Q. Now was there any occasion when they indicated that your contract could be cancelled unless you cease buying automotive exhaust parts other than Midas, that is, mufflers or pipes?

A. The same thing applied to that, yes.

Q. Could you detail for us briefly the occasions when these conversations took place?

A. I don't remember exactly when these conversations took place, but I know that they did, and from time to time they would tell me that if I continued to sell these items other than exhaust parts that my contract could be cancelled. And eventually, I believe, that it was cancelled for that reason.

Q. Well, my question at this point is directed not to shocks and springs and other products, but to exhaust systems only, such as Nu-Era or Texas Tailpipes, or what have you.

A. Yes.

Q. Would you explain those conversations for us?

A. Well, Mr. Gordon Sherman came into my warehouse at one time and saw a shipment of Texas Tailpipes there and he was very unhappy about it.

318 Q. What did he say?

A. He said to me, he said, "Joe," he said, "You know our franchise is just like a marriage, this is like cheating on your wife, it is grounds for divorce."

319 Q. You indicated that you thought the reason for your cancellation was your continuing to sell shocks and springs?

A. Yes, I do.

Q. Do you know of any other instance other than yours which might be covered by the sentence beginning at the last of Page 17 and continuing over onto Page 18?

A. Yes. I know that at the time they cancelled my franchise that they were putting pressure on the Buffalo shop operators, and they were told that if they did not discontinue the sale of their shocks and springs that their contract would be terminated and they agreed to discontinue them. And this was told me by Bernard 320 Miller, the representative of Midas that was checking my stock out and shipping it back to Chicago. He told me that his next stop was Buffalo and he told me they were taking their shocks and springs out. I said, "You really mean that Bernie?" He said, "Yes, they had agreed to it."

IN THE DISTRICT COURT OF THE UNITED STATES

• • (Caption—No. 60 C 1636) • •

DEPOSITION OF MAXWELL ROSS

44 Q. Would you explain your last remark about the difficulty?

A. Yes, sir. When I signed my franchise, my original franchise in Muskegon, it was signed for the City of Muskegon or the County of Muskegon.

When I signed my franchise for the Grand Rapids location I signed for the Kent County area, not a specific address.

When they gave me the franchise for Minneapolis, they wanted to pin it down to one particular location only, and I wanted the whole area. I wanted not only the Minneapolis but St. Paul. You know they are called the Twin Cities. I was finally persuaded to sign the franchise for the specific location with tacit expression and tacit permission to open up anywhere in the Minneapolis area that I wished. St. Paul was held out.

48 Q. What determined you to open the Lake Street location?

A. Well, I had had a good measure of success in the Muskegon and Grand Rapids areas. I liked the program. It was making money for me. I wanted to get into a larger metropolitan area, and Minneapolis was open.

57 Q. In what way was that more efficient?

A. Well, I have always felt that the repair business, the automobile repair business had perhaps a distasteful

meaning to the public, and in many cases you are dealing with an unknown quantity when you are dealing with a consumer. I wanted to take that uncertainty out of my business if I could, because if I could put that car up on a hoist, I could actually show the customer what he needed.

69 Q. Did you sell springs and glass during that year?

A. I sold springs.

Q. But no glass?

A. No, I sold no glass.

Q. So during 1956 from Grand Rapids, you sold only mufflers and allied pipes and springs?

A. Springs, I was stopped from selling glass.

Q. Did you start to sell glass?

A. No.

70 Q. You weren't stopped from selling glass?

A. I was told not to.

Q. What about 1957 at Grand Rapids, what products did you sell?

A. I discontinued selling springs or any other allied products, I believe, sometime in July of 1956, and from that point forward sold nothing else but mufflers and pipes.

172 The second shop was very succesful, at least in my estimation, and I began to think what I should do in Grand Rapids, because I was not satisfied with that location in Grand Rapids even though it was doing, even by Midas standards, a pretty good job so far as volume was concerned.

So, I approached Lou Gurnick and told him I wanted to open up a second shop in Grand Rapids. . . .

174 So I approached Lou Gurnick again. I said, "I will tell you what I will do, Lou. Give me permission to open up a second shop at the north end of Grand Rapids, and I will have it built by January or February of 1959."

210 Q. Did you ever make any objection to anyone at Midas about following those prices?

A. Most certainly.

Q. Any objections apart from the incident involving Tideys which you mentioned yesterday?

A. Yes, sir.

Q. What was the first such occasion?

A. There again I am not specific so far as dates
211 are concerned, but at various times I spoke with Lou Gurnick and also with Jack Brezin prior to him, that I felt it was unfair for me to compete with international because they had no fixed price policy. They were under-selling me on the telephone and over the counter and I had no way of competing with them. In essence the story was correct, when he said this was the same muffler, the same guarantee, made by the company. I had no weapon to fight him with.

238 Q. Referring again to Defendants' Exhibit 9 for identification, what did the agreement mean to you at the time you executed it.

A. Well, let me say generally this was merely an agreement which give me specific territory to sell merchandise identified as Midas. It was an avenue of outlet for them and an avenue for sales and profit for me.

This in general terms is what I thought about this.

. . .

239 Q. Did he explain to you that the whole idea of Midas was a new concept in automotive exhaust installation?

A. I don't know whether he called it a new concept. This is what I have termed it. It was—I don't know how he generally described it, but to me it was a new concept.

Q. What did it mean to you?

A. It meant that I thought that this was a good idea. I thought that it was a way of making some real money
240 if you got into it quickly.

Q. But what were the business operations involved in this new concept?

A. Generally, the thing that excited me was the guarantee, the advertising program which they were going to generate on a national level, the free installation which was a magical term, at least, so far as the public was concerned, and the 15-minute installation was a convenient thing, and I recognized that always the owner of an automobile is interested in quick service.

Q. Didn't he explain to you that this concept was one involving installation solely?

A. No, sir, there was no restriction made on me on the sale of that muffler originally.

Q. When you say originally, you mean there was later?

A. Yes, definitely later.

241 Q. When was that?

A. I don't recall whether there was a general discussion at the convention that was held in Chicago some-

time in March of 1957 or whether there was specific discussion with myself and Mr. Brezin at a later date about the over-the-counter sale of mufflers, but certainly the specific subject was mentioned several times, if not many.

246 Q. Did you ever call it to his attention that the language of the agreement apparently gave you the right to use your name?

A. If you recall—and I am not saying that this is so—this one was cancelled and I received a new one. I don't know what this new agreement states.

Q. You are referring to Defendants' Exhibit 10 for identification?

A. Yes. This is the first agreement I signed with him. I don't recall what restrictions, if any, there were on the second one; but let me say this, that the threat of cancellation was always held over my head if I didn't comply.

252 Q. Calling your attention to Clause F in Section 2 of Defendants' Exhibit 4 for identification,—

A. This clause apparently is a change from the previous agreement which I signed. Here again, may I state for the record, this agreement was signed two years later, approximately. I am talking about Defendants' Exhibit 4 as against Defendants' Exhibit 10.

Two years from the date of the original agreement I had already spent a considerable sum of money advertising the name "Midas." I had already committed myself to this program for two solid years. I had no choice but to sign the second agreement.

We had one issue, which I discussed in my previous testimony, insofar as location was concerned. I think mostly I was concerned with that. As far as the change in location was concerned, this was to my disadvantage.

Yet I signed. There were other clauses in this con-
253 tract that were against my particular interest as compared to my first agreement. But I signed, not because I wished to sign it, but because I really had no other choice.

Q. Would you explain that a little more? I am not certain that I understand why you thought you had no choice?

A. There were two avenues open to me. One was to say I am not going to sign this agreement, in which case my franchise would have been revoked and I would have had no franchise; or continue in its operation with the changes as set forth in Defendants' Exhibit 4.

These were clauses certainly taking away the benefit or certain benefits that I had contained in Defendants' Exhibit 10.

So I came back to my original premises. I had a choice of doing either one of two things, either divorce myself from the Midas program at that time or the Midas muffler at that time, or continue. Since I had committed myself to two years of operation at considerable expense, I felt that this was what I had to do, or I would have lost.

256 Q. During the time that you were in the Midas program, did any representative of Midas ever call your attention to any specific provisions of the contracts under which you were operating?

A. In my discussions with Mr. Brezin and Mr. Gurnick covering restrictions on sale of other merchandise, I believe this clause in the contract was referred to.

Q. That would be the clause with respect to other merchandise, is that correct?

A. Dealing with the exclusive part of the contract.

Q. That would be Clause C of Paragraph 2 of Defendants' Exhibit 4 for identification, and the same clause in Paragraph 2 of Defendants' Exhibit 10 for identification, is that correct?

A. That one, and also the exclusiveness of buying everything from Midas, also. These were two pertinent aggravating situations that I discussed with my field counselors and certainly with Mr. Brezin.

Q. Do you recall the substance of any such conversation?

A. I remember discussing it specifically initially in the program with Mr. Brezin, because this was a gentleman that came back to me later on,—I would say some-
257 time in July or perhaps August of 1957—and said,

"I am embarrassed." He said, "You have to get rid of your springs in Muskegon and Grand Rapids."

I said, "Why?"

"Against company policy," he said.

I said, "But, Jack, you sold me those springs. What happened?"

He said, "Gordon told me that you are a model operator in the program. You are an example that had been set up as something to look up to. How could we tell the other people in the Midas program that you are selling springs and tell them that they can't sell springs?"

I said, "You mean to tell me I have to get rid of those springs?"

He said, "That is the it has got to be."

And I sold those springs at a considerable loss.

258 Q. No, any of them, if there were any such conversations.

A. I had many discussions not only with Mr. Brezin and Mr. Gurnick, but also with Gordon Sherman and with Nate Sherman but probably not together, because I doubt that Mr. Gordon Sherman and Mr. Nate Sherman ever could be found together.

I had conversations with both of the gentlemen on the two restrictive clauses. One was the restriction as 259 to being able to sell only mufflers and pipes, because

I told Gordon Sherman particularly, either during the March 1957 convention or shortly thereafter, that I felt the competition would set in, that we as Midas operators did not have a broad enough base to warrant sufficient volume.

I felt that the Midas operators should be allowed to broaden their base of operations to include shocks and springs, anything of a general nature that wouldn't interfere with their concept of what this operation should be, anything underneath that car, because I felt as a retailer that if I could bring traffic into my shop and if I could put that car up on the hoist and have a customer look at it, there are many things underneath that car I could sell.

I was restricted and the answer was "no."

I was also familiar with the fact that I could buy other merchandise, specifically, without trade name. I didn't want to try to buy other mufflers, but I did want to buy other pipes. There were available to me, through conversations with other boys in the program who were buying these pipes at considerably less money.

The answer was "no." I asked them why. I said, 260 "There is no trademark on that pipe. There is no insignia on the pipe. The customer would never know whose pipe it was, who manufactured it. What difference did it make to Midas whether I sold a Midas pipe

or an International pipe or a Texas pipe, or a Joe Schmoe pipe?

The answer was "No, all Midas; your agreement says so."

Q. Did both Gordon and Nate Sherman say, "Your agreement says so, all Midas?"

A. All Midas, both of them.

265 Q. Would you detail those threats and the subject matter that brought them about?

A. Specifically, here was an instance in which my Grand Rapids manager sold merchandise, or I should say mufflers, over the counter to a wholesale outlet, I believe, at Lake City, Michigan.

Q. Lake View?

A. Lake View, that is right. I tried to stop it and eventually I did stop it, with the expressed threat
266 of cancellation.

Q. Who expressed that?

A. Mr. Gurnick.

Now, in the other area, so far as restricted merchandise was concerned, in the area of selling over the counter, implications were made to me that I must comply with my contract.

Q. By Mr. Gurnick?

A. By Mr. Gurnick, and when I said to him, "Suppose I don't?" the answer was never "I will cancel your contract." The answer was evasive. It was always, "Well, what do you think is going to happen," "So, what is going to happen", "you know what can happen. It has happened in other shops. You saw the situation in Sarasota, Florida."

There was no other inference that I could take. It was either a matter of complying with specific requests or specific clauses contained in these Exhibits 4 and 10, or else running the risk of cancellation; and I saw where cancellation had been made specifically.

284 Q. You mentioned the National Advisory Council. Would you describe that for us?

A. I will try. I was first advised about the National Advisory Council at the first convention which was held in Chicago in March of 1957.

I was appointed to that council by Mr. Gordon Sherman. As represented to, this particular group of ten people who were chosen to serve on that National Advisory Council represented, in Mr. Gordon Sherman's opinion the ten foremost Midas dealers in their program as of that date.

As I understand it, the function of this National Advisory Council was to meet upon suggestions from headquarters in Chicago at their expense to discuss all phases of the operation. It was a discussion of ideas, an exchange of ideas, covering all phases of the operation, whether it was installation techniques or advertising methods and ideas of selling techniques, anything of a general nature that would promote and help the program for the benefit of everybody in the program.

By "program" I mean—call it an organization; call it a society; call it an affiliation. I don't know what you care to call it. It was a group of people with a common purpose in mind.

288 Q: What you considered actually—my question was: Define what you considered your function to be as a member.

A. Let me put it very briefly. Every one of us who was a Midas dealer was in this program—and I want to put quotation marks around the word “program”—in this thing, for one paramount reason; and that was to make the most money he possibly could.

This is the prime reason for anybody going in business, either in business or the professions. I am sure that is your prime purpose, to make as much money as you possibly can. Our purpose was to formulate ideas and patterns of operation to produce the optimum of profit for each Midas operator.

* * *

399 Q. Were those products similar or identical to the products offered by Midas?

A. What do you mean by “similar” or “identical”, sir?

Q. That is the word used in your Complaint, so I believe I will have to ask you to answer it as best you can?

A. As to mufflers, they were different insofar as physical appearance was concerned. As to tail pipes and exhaust pipes, to me there was no difference.

* * *

409 Q. During the time you were in the Midas program, did you ever request permission to purchase International brand automotive exhaust parts?

A. That would be rather silly. It was the same merchandise I was buying from Midas. What would be my purpose?

The answer to that would be “no.”

* * *

421 Q. It is a fact or is not a fact that you were damaged by action of the defendants in not allowing you to sell shocks, brakes, glass and springs?

A. Yes, sir, it is a fact.

IN THE DISTRICT COURT OF THE UNITED STATES

(Caption—No. 60 C 1636)

DEPOSITION OF GREGORY T. SKARUPA

14 Q. What led to your decision to open a business in October of 1955?

A. I was invited to Cincinnati, Ohio to see a muffler shop operated by a brother-in-law. This muffler shop carried automotive exhaust parts that were purchased from International Parts, and shock absorbers, and springs, and the operation looked as though it might be a profitable one for me to invest in. I liked the idea of being able to service the public with under-the-car items.

15 Q. Following your visit to Cincinnati and your awakened interest in this business, what if anything did you do?

A. Prior to our leaving Cincinnati Mr. Hiudt called Mr. Gordon Sherman and introduced me to Mr. Gordon Sherman over the phone and indicated to Mr. Gordon Sherman that I would be a good prospect to open a muffler installation shop in the Washington, D. C. area.

30 Q. Now would you recall for us, as best you can, exactly what was said at this conversation?

A. Yes. Mr. Sherman indicated that he was pleased with my shop lay-out and was pleased with my appearance as a dealer and would be further pleased to franchise me under the Midas program. I indicated to him that I was interested in the Midas program provided I got assurances from him that the Washington metropolitan area would be assigned to me so that if I developed it I could reap the benefits of such development.

. . .

34 Q. Well, as I understood your testimony, you stated that in your conversations with Gordon Sherman in March of 1956 you brought up this territorial question as to you being assured the metropolitan Washington area.

A. That is correct.

Q. As I further understood your testimony, you
35 stated you did not go over the requirements of the franchise with Mr. Sherman, you went over them with Mr. Zuckerman prior to your conversation with Mr. Sherman?

A. I had seen the franchise form before Mr. Zuckerman came to town.

Q. Had you discussed it with Mr. Zuckerman prior to that time?

A. No, I don't think I did.

Q. But you had gone over it, yourself?

A. Yes.

Q. And the territory was the only requirement that you discussed with Gordon Sherman?

A. To the best of my recollection, yes.

Q. Had you noticed that the franchise contained a section concerning competitive goods?

A. Yes, I had, but at the moment, in the heat of going into a new program, I didn't pay too much attention to it.

. . .

55 Q. Was the matter of the entire Washington, D. C. territory ever discussed subsequent to the execution of the first License and Sales Agreement?

A. Yes.

56 Q. Can you tell us when and where, and with whom?

A. This was a telephonic conversation between myself in Washington, D. C. and Gordon Sherman in Chicago in the late summer of 1958. I had just completed opening the Alexandria shop, and I indicated to Gordon that I was ready to open up additional shops, especially in view of the fact that I was now devoting full time to the business. Gordon Sherman refused to give me permission for further expansion by stating to me that I was making so much money that I would soon not know what to do with it, and that this time would be better spent in consolidating my holdings and resting a little bit.

It subsequently developed as of the time of our conversation that Gordon Sherman had plans to restrict my expansion completely, and, as a matter of fact, he wanted to bring new dealers into the territory to give me competition.

. . .

100 Any other particular items that you recall that you purchased from outside suppliers?

A. For the same period?

Q. Yes, while you were in the Midas program.

A. Yes, I bought shock absorbers in the latter part of 1959 from Bill Zuckerman.

Q. Were those Monroe brand?

A. Yes, they were.

Q. Did you have any conversation with anyone from Midas about those purchases?

A. Not about those specific purchases, but I did have a conversation with Gordon Zuckerman.

Q. You mean Bill Zuckerman or Gordon Sherman?

101 A. Excuse me, I am sorry; with Gordon Sherman in the latter part of '58, in the same telephone conversation that I had that I referred to in my deposition yesterday. To bring you up, this was a conversation in which I asked Gordon if he would allow me to expand further.

During that same conversation, I indicated to him that it would be a good idea if the Midas shops were allowed to introduce the item of shock absorbers as one of the items to sell to the public, and Gordon Sherman disagreed with me at that time, and indicated that he couldn't give me the permission to carry shock absorbers in my shop because it would be contrary to the Midas image.

Subsequent to that, I had had conversations with Hal Krieger who is on Gordon Sherman's staff, at a meeting of Midas dealers at the Arva Motel in the Spring of '59, where I recommended to Hal that both shock absorbers and a separate, second line muffler be introduced as items to sell from the Midas Muffler Shops, and Hal Krieger's answer to my recommendation was that that would never be; it would never be allowed, and he was positive on that score in his statement to me.

119 Q. Did you at any time ever indicate to any representative of Midas or International Parts that you wished to be free of this price structure?

A. Yes, I spoke to Hal Krieger at the Arva Motel dealers' convention in the Spring of '59 that competition was increasing to the point that we required relief either through the introduction of additional items such as shock absorbers and a second-line muffler, or allowing us to deviate from the price list in order to offset this tremendous competition.

Mr. Krieger was completely unsympathetic.

Q. What did he say, if anything?

A. He said, "It will never happen."

* * * * *

155 Q. Was there any occasion other than this spring of '59 meeting and your Fall of '58 conversation with Gordon Sherman, where you have raised definite objections to any part of the Midas program with any representative of Midas?

A. Yes, I recall speaking to Bill Zuckerman on occasion about the two percent advertising and about the freight bills that I was paying. By this time, I had learned what the trade was doing.

Q. With respect to what, the freight?

156 A. The freight.

Q. And what was that?

A. The trade generally shipped the merchandise, the freight prepaid, to the point of use, whereas Midas required that we pay the freight, and this amounted to eleven percent in my area.

Q. Now, International hadn't paid the freight, had they?

A. No, they had not.

Q. When you speak of the trade then, of whom are you speaking?

A. Goerlich Muffler Company, Maremont Corporation, Haviland Muffler Company, the companies that manufactured tailpipes at lower prices, such as the Williamsville, New York company, Texas Tailpipe Company, Carcrest Company, and a number of manufacturers who specialized in Hollywood mufflers, dual kits.

Q. What was Mr. Zuckerman's answer?

A. Generally speaking, his answer was, "You are making money, so why squawk?"

Q. Did you have any rejoinder?

A. I indicated to him that you made money in business from every conceivable source that money is to be made, and if there are price advantages, you should be in a position to take advantage of them.

Q. To your knowledge, was that request of yours carried any further than Mr. Zuckerman?

A. Not to my knowledge.

Q. And what was the nature of your complaint about the advertising sur-charge?

A. We had received a bulletin from Midas indicating that a pair of new shops in the Clifton Heights, New Jersey area had been selected by Midas to test out a method of advertising, half-page newspaper mats, as opposed to the smaller newspaper ads that we were inserting. These ads were paid for, as I understand, by Midas and I felt that since I was paying a two percent surcharge, and if Midas was handing out extra advertising funds to a dealer, that I was entitled to a portion of these extra funds as was anybody else.

Q. You discussed this with Zuckerman?

A. Yes.

Q. To your knowledge, was that complaint taken any higher?

A. Not that I know of. Can I inject something in here?

Q. Sure.

A. About other areas that I complained about to 158. Bill Zuckerman.

Q. All right.

A. It may not be in line with what you previously asked me, but I objected to Bill Zuckerman to the fact that there were other dealers in the Midas program carrying shock absorbers with Midas approval, and I wanted to know why we weren't given the same authority, and Mr. Zuckerman told me that he also knew of these two shops, the ones that were located in Buffalo, New York, and one in Syracuse, New York, and that he had been instructed by Gordon Sherman at a Midas field representative's meeting in Chicago, to bring these dealers into line on their non-muffler lines, and he told me that he had been given specific instructions to go up there and clean them out, or else give them the ultimatum that Gordon Sherman had given him to carry out, which was to the effect of disenfranchisement.

.

166 Q. You were made aware of the decision on the
167 guarantee that was made at the October, 1958 meet-
ing in Chicago, were you not?

A. All dealers got a letter to that effect announcing the change in policy.

Q. And was that from Gordon Sherman?

A. Yes, it was.

Q. What was your reaction to this letter?

A. It was a mixed reaction.

Q. Would you explain it, please?

A. I felt that the company was reneging on its policies stated in the franchise. I knew that this would have a bad effect on my profit picture because at this time my replacements were amounting to a substantial amount of traffic into the shop. At this period we were replacing in excess of 20% of the mufflers in proportion to those sold.

I felt that Midas was making the dealers petty for the full cost of the replacement program, and this was based on a statement of their production costs.

At this time I was beginning to feel the increased competition from other muffler installation activities in the city, in my territory, and I felt that it was not the cleanest thing that the company could have done.

188 Q. Calling your attention to Count III, Paragraph ~21 of the complaint filed herein which alleges that the defendants granted discrimination in prices and services to certain of their customers without offering or otherwise making available those same prices and services to others of their customers including the plaintiffs. Would you detail for us what you understand is meant by those charges, Mr. Skarupa?

A. I don't know if I am qualified to give you an understanding?

Q. That is correct. What do you, Mr. Skrupa, understand the charges contained in that paragraph to be?

A. It is my understanding that certain International accounts received discounts that were not available to

Midas dealers and that they received full credit on 189 guarantee replacements when Midas dealers' replacement credits were reduced to 50%.

Q. Now would that apply to Boyd in Silver Springs?

A. I don't know whether he was getting the, any discount other than the 2% cash discount, but I do know that he was getting 100% replacement credits for any mufflers that went bad.

201 Q. Now isn't it a fact, Mr. Skarupa, that you had begun buying goods from outside sources as early as April of 1959?

A. Yes.

202 Q. And had anyone from Midas ever said anything to you about this?

A. No, because I kept the stock hidden.

271 Q. Now did you ever indicate to any such salesmen or representatives that the reason you wouldn't purchase was because of your Midas contract?

A. Yes.

Q. Which ones?

A. I remember specifically telling Mr. Lynch that I was barred from purchasing mufflers because of the contract, and certain of the clamp salesmen and the salesmen representing the spring manufacturing company. The same applied to the salesmen from the Monroe Shock Absorber distributor.

Q. Now was Mr. Lynch trying to sell you mufflers?

A. Mufflers and tailpipes and clamps.

272 Q. The full line?

A. The full line of automotive exhaust supplies and parts.

Q. Did he make any comment when you told him that you were barred by contract?

A. Yes. He indicated that he had run into this opposition in other areas throughout his territory, other shops throughout his territory.

Q. Was that the end of the conversation?

A. He made repeated calls thereafter despite the knowledge that he couldn't do business with us.

Q. What line of argument would he use to attempt to convince you to do business after finding out that you were barred by contract?

A. That we were losing profits to the tune of approximately 20 to 25% or better.

310 Q. And I believe you said that you had not calculated any amount as far as territory expansion, is that correct?

A. I have not, sir.

Q. Do you think that you can today?

A. We were of the opinion that a shop grossing a hundred thousand dollars in sales should realize a net profit of \$20,000. approximately, and dependent upon
311 the number of shops we could have opened, this factor of \$20,000, when multiplied by that number would give us an approximation of profits lost.

Q. How many shops do you think could have been opened?

A. I had indicated to Gordon Sherman at one time that I thought Washington was capable of supporting, under my administration, seven to eight shops.

IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—No. 60 C 1636) *

DEPOSITION OF CLAUDE WHEELER

7 Q. Was that the first experience you had with automotive exhaust parts?

A. Yes, sir.

Q. How did you happen to become interested in that business?

A. I saw it advertised in the paper and I was looking for something to get into. I saw it advertised, I believe, in Life Magazine the first time.

Q. I didn't catch that.

A. I saw it advertised in Life Magazine.

Q. Life?

A. Yes, they were advertising for dealers and I answered the ad.

Q. Did you write direct to Chicago?

A. Yes, sir.

Q. Then what happened?

A. They sent a representative to see me.

67 Q. And would you state the substance of the conversation?

A. I believed that we would have a year in 1957, we were starting out fairly well. I was getting to learn
68 the business, and I wanted to expand the business, and naturally Fitzshall had told me, though, if I didn't

expand it now that someone else would come into the market and leave me with just the one franchise, and I didn't want that to happen at this time so we proceeded to look for a building.

68 Q. Did Mr. Fritzshall indicate he had been instructed by anyone in the Midas organization to instruct you if you did not expand you would not get the additional territory?

A. Yes.

Q. And who so instructed him?

A. Mr. Gordon Sherman.

Q. At this time were there any other Midas shops
69 in St. Louis?

A. No.

Q. In the St. Louis area?

A. No.

Q. Did you indicate any disagreement with Mr. Fritzshall about expanding at that time?

A. I would like to have waited until the first shop got to producing at that time.

Q. Did you so inform him?

A. I informed Mr. Frizshall, yes.

Q. Anybody else?

A. He was the only one.

Q. What was his reply?

A. Well, it was the same thing, if I didn't do it, why, then they would have to go find another person to take a franchise.

92 Q. What was the substance of the conversation?

A. Mostly it was about the exclusive. I wanted an exclusive franchise since I was going to open a third shop

under, you might say, a little pressure, because opening three shops in a twelve-month period was a pretty good strain.

Q. You wanted an exclusive for the entire St. Louis area, is that correct?

A. Yes.

111 Q. Did you have any conversations with anyone from Midas with respect to the purchase of outside goods during 1958?

A. Yes. I had talked with Mr. Fritzshall because I was beginning to get calls from other factories to sell me products that I could possibly use, and that I could have bought at substantially less than I was paying for Midas.

Q. Do you remember when the first conversation was in '58?

A. Not precisely.

Q. Were these general conversations all through the year?

A. Yes, sir.

Q. Could you give us the substance of them?

A. The substance of the conversations?

Q. Yes.

A. Just the fact that I was being offered these
112 mufflers and pipes at a substantially lower price. Of course, he indicated that that would not be possible because it was against Midas policy. He indicated to me that some of the fellows who were doing it were subject to get their franchise taken away.

128 Q. Is his the first time you consulted a lawyer in connection with any of these franchise agreements?

A. Yes, sir.

Q. What caused you to consult him at this time?

A. Well, I had made mistakes before in agreements and locations and I wanted to be sure that this just didn't happen again.

Q. In what way had you made mistakes?

A. In the first one we settled for too small a territory, and the second and the third there were certain restrictions in the franchise that would keep me from buying related products.

Q. When was this store opened?

A. The Rock Road Store?

Q. Yes.

A. In June of 1959.

Q. When did you receive the Midas form of franchise?

A. It must have been approximately a month before because we closed the Grand Avenue in May of 1959. In the process of moving it, during the month, I think
129 we received the new franchise.

Q. Now when you sent it back did you send an explanation with it?

A. I don't remember if I did or not.

Q. Are you sure you sent it back?

A. I believe that we did.

Q. Did you just put it in an envelope and send it back without any letter or anything else?

A. I gave it to my attorney, I am sure. I don't know if he wrote a letter with it or not.

Q. Oh, you didn't return it? If it was returned it was returned by your attorney, is that correct?

A. Well, I talked with my attorney about it and if there was a letter written, why, I am sure that he sent it with the franchise.

Mr. McGee: Would you repeat my question?

(Question read.)

A. Not necessarily.

Q. You don't know. Tell me this, if this is correct, that you don't know whether it was returned or not?

A. I am not sure.

Q. If it was returned it could have been returned 130 by either you or your attorney, is that correct?

A. That is correct.

Q. And if a letter accompanied the return of the document the letter was written by your attorney and not by you, is that correct?

A. That is correct.

Q. What provisions of this particular contract did you object to?

A. Not being able to buy from other manufacturers as well as I remember was offe, or not being able to handle allied products and the territory for another. And I believe this franchise had the 50 percent guarantee written within it. I didn't agree with that.

150 Q. Did you ever purchase any pipes from Texas Tailpipe Company?

A. No, sir.

Q. Did you ever have any conversations with anybody from that company?

A. Yes.

151 Q. When was the first such conversation, if you recall?

A. The latter part of '57, or the first part of '58. I am not sure.

Q. Was that a sales representative?

A. Yes. There was a sales representative.

Q. Did he call at your place of business?

A. Yes, sir.

Q. What was the substance of the conversation?

A. He tried to sell me Texas Tailpipes. He tried to show me where I could buy pipes from Texas cheaper than I could buy them through my supplier who was Midas.

Q. What did you say to him?

A. I explained to him that I had a franchise, that I couldn't buy pipes through anyone else but Midas.

Q. Did you ever discuss this with anyone from Midas?

I am sure Fritzhall and I had talked about Texas Tailpipes.

Q. Do you recall the substance of that conversation?

A. Well, I had pointed out to him that I could buy pipes cheaper if I bought through Texas Tailpipe. I could save a considerable amount of money. I could save a considerable amount of money in the year's purchase.

Q. What was his reply?

A. Well, he explained to me that I should know by now that I wouldn't be able to purchase from outside sources because of the fact that I would get my franchise cancelled and he explained to me that others had their franchise cancelled from the purchase of outside products.

232 Q. But I think that you have previously mentioned that you were cited examples of Sarasota, Florida, is that correct?

A. Yes, I believe that was one of them.

Q. And Mr. Pierce of Syracuse?

A. Yes.

Q. Any others?

A. We had talked to several different dealers who were handling other products, and it was the Mida's policy that they should never handle them.

Q. Well, my question for the moment is limited to automotive exhaust systems.

A. Or to even purchase from other sources.

Q. Were there any other examples that you can give or recall other than those two which I mentioned?

A. Not that I can recall right at this time.

233 Q. My question is: did anyone ever threaten you with cancellation if you did so?

A. They had told me that the franchise—I would lose my franchise if I bought from outside sources.

DEPOSITION OF GORDON BERNARD SHERMAN

78 Q. Thank you.

Now, is the exhaust pipe a trade mark item?

A. I don't know.

Q. Let me put it another way; is there a trade mark on the exhaust pipe?

79 A. I don't believe so.

Q. And is there a trade mark on the tail pipe?

A. I don't believe so.

Q. And is there a trade mark on the—did you say clamps?

A. Yes, I said clamps.

Q. Is there a trade mark on the clamps?

Let me be more precise than that, sir. Is there a trade mark physically affixed to the clamps in any fashion?

A. I don't believe so.

Q. Is there a trade mark physically affixed in any fashion to the hangers?

A. I don't know.

THE DEPOSITION OF ROBERT T. SCHROEDER

11 Q. In 1955, if you can remember, sir, who was International Parts purchasing mufflers from?

A. International Stamping, Metco. I believe that is all.

14 Q. Well, when you ordered, let us say, a muffler, how did you describe that muffler to either International Stamping or Metco?

A. By stock number.

Q. Now, where did that stock number come from?

A. I don't understand your question.

Q. Well, was that a stock number promulgated by International Parts Corporation or was that stock number promulgated by Metco or International Stamping?

A. By International Parts.

Q. Was Metco familiar with International Parts Company numbers to your knowledge?

A. Yes.

22 Q Now, in 1955, when you placed an order for mufflers from Metco, was there any difference in the muffler which was branded International and the muffler that was branded Midas, except for the identification of brand?

A I don't believe so.

Q Was the same true in 1956?

A Yes.

Q Was the same true in 1957?

A Yes.

Q Was the same true in 1958?

A Yes.

Q Was the same true in 1959?

A No.

Q What was the difference in 1959?

A In 1959, the design of the Midas muffler was changed. The outward design was changed to a diamond design. Heavier gauge steel was used throughout the Midas muffler as compared to the International.

Q Did that condition or did those changes persist in 1960?

A Yes.

23 Q In 1955, was there any difference between the muffler to be purchased from Metco and the muffler you purchased from International Stamping?

A I don't believe so.

24 Q Now, sir, in connection with your purchasing from International Stamping for the year 1955, was there any difference in quality or design in the muffler

which you purchased from them that was marked International than there was in the muffler which was marked Midas?

A No.

Q Did that same condition exist in 1956?

A Yes.

Q And did it persist in 1957?

A Yes.

Q Did it persist in 1958?

A Yes.

Q Did it persist in 1959?

A No.

Q I take it the same thing happened in 1959, with respect to International Stamping that happened with respect to Metco?

A That is right.

Q Now, in 1956, was International Parts purchasing mufflers from anyone other than International Stamping or Metco?

A I believe so, yes. If Muffler Corporation was in existence at that time.

Q Muffler Corp. would be the only additional—

A Right.

Q —source?

And in 1957, we will assume and we will verify the date later that Muffler Corp., was in existence if it was or it wasn't, were International Stamping, Metco and Muffler Corp. the only sources of supply for International Parts Corporation?

A Yes.

Q And were these the only sources for the year 1958?

A Yes.

Q Were these the only sources for 1959?

A Yes.

Q And were these the only sources for 1960?

A Yes.

55 Q Now, with reference to the other items which included on this list which we just went over which International purchased; was a brand name stamped on such items by the manufacturer or by International Parts?

A I don't believe so.

56 Q Was the Midas name placed on any of these items by putting the item in a box with a Midas name on it or by attaching a tag with a piece of wire or string during any of the period 1955, through and including 1960?

A Not to my knowledge.

DEFENDANTS' DEPOSITION EXHIBITS⁸

DX 6

November 13, 1959

Midas, Inc.
4101 W. 42nd Place
Chicago 32, Illinois

Gentlemen:

Under paragraph V of your license and sales agreement dated December 4, 1958, between Midas Muffler Shop of Grand Rapids, Inc. (Midas of Grand Rapids, Inc.) and Midas, Inc.; you are hereby notified of our intention to terminate this agreement at the close of business December 12, 1959.

Very truly yours,

MIDAS OF GRAND RAPIDS, INC.

Maxwell E. Ross, Pres.

M. E. ROSS

• • •

⁸ The exhibits marked at defendants' depositions of plaintiffs (DX 1-DX 201) were transmitted to this Court under a separate certificate by the District Court Clerk. The reference to those exhibits, pages 103 to 109 hereafter, are to the original deposition exhibit numbers.

DX 7

November 13, 1959

Midas, Inc.
4101 W. 42nd Place
Chicago 32, Illinois

Gentlemen:

Under paragraph V of your license and sales agreement dated December 4, 1958, between Midas Muffler Shop of Muskegon, Inc. (Midas of Muskegon, Inc.) and Midas, Inc.; you are hereby notified of our intention to terminate this agreement at the close of business December 12, 1959.

Very truly yours,

MIDAS OF MUSKEGON, INC.

Maxwell E. Ross, Pres.
M. E. ROSS

* * *
DX 25

Midas, Inc.
4101 W. 42nd Place
Chicago 32, Illinois

Gentlemen:

You are hereby notified that I am cancelling the Midas franchises for the following Midas Muffler Shops effective sixty days from this date, namely February 11, 1960 being the termination date:

Perma-Life Mufflers, Inc.
T/A Midas Muffler Shop
2652 University Boulevard, West
Wheaton, Maryland

Perma-Life Mufflers of Arlington, Inc.

T/A Midas Muffler Shop

2115 Wilson Boulevard

Arlington, Virginia

Perma-Life Mufflers of Prince Georges County, Inc.,

T/A Midas Muffler Shop

3646 Bladensburg Road

Cottage City, Maryland

Midas Muffler Shop of Alexandria, Va., Inc.,

T/A Midas Muffler Shop

1912 Duke Street

Alexandria, Virginia

Very truly yours,

Gregory T. Skarupa

Gregory T. Skarupa

DX 26

Advertisement

MUFFLER SHOP SECRET EXPOSED

By Greg Skarupa

To my many friends and customers. I thought you'd like to know that I am no longer associated with Midas.

I've re-established my original business name, PERMA-LIFE MUFFLERS, just so that I can introduce a superior heavy duty auto muffler in the Washington area. It's aluminum-zinc coated inside and out, with asbestos interlining between the coated multi-wrapping where needed for heat control.

It's the *only* muffler in this area that is fully guaranteed in writing against rusting out. This is the muffler I will

install in honoring all of the guarantees I have issued in my five years of muffler sales and servicing. So, come see me. I'm still doing business at the same old stands, in Arlington, Alexandria, Cottage City and in Wheaton where we have moved to new enlarged quarters at 2404 Price Avenue (corner Georgia and Price next to Wheaton Safeway). Just look for the PERMA-LIFE MUFFLER SIGNS.

DX 45

September 4, 1959

Midas, Inc.
4101 W. 42nd Place
Chicago 32, Illinois

Gentlemen:

Pursuant to the provisions of Section V of each of the License and Sales Agreements between myself and Midas, Inc., I hereby give written notice of my intention to terminate all said agreements on November 9, 1959, said date being more than 60 days from the date hereof.

As of said date, November 9, 1959, all said agreements are and will be terminated.

Yours very truly,

Claude Wheeler

Claude Wheeler

DX 53

February 25, 1959

Mr. Gordon Sherman; President
Midas, Inc.
4101 W. 42nd Place
Chicago 32, Illinois

Dear Gordon:

Our muffler replacements for the month of January were 326. Our cost of replacing these mufflers under the present guarantee policy is approximately \$1,000.00.

At this rate, with January being a slow month, we can expect our share of the replacement cost to be about \$20,000 this year.

I have no fault to find with your 50/50 replacement policy, were it to apply to the new muffler only. The 50/50 replacement cost on the old muffler does not seem fair.

I personally feel the fault lies in the quality of the muffler. I am sure our replacements would be very few and far between if we had had a quality muffler to begin with.

I am writing you in all fairness and stating my dissatisfaction with the present program. If I should decide to make a change in the future I would like this to go on record as to the reason why.

Very truly yours,

MIDAS MUFFLER SALES & SERVICE

Joe

J. C. PIERCE

DX 56

PIERCE MUFFLER SHOPS INC.
1205 ERIE BLV'D., E.
SYRACUSE, N.Y.

December 22, 1959

Mr. Robert M. Jacob
Director of Franchises
Midas Inc.
4101 W. 42nd Place
Chicago 32, Illinois

Dear Mr. Jacob:

We are making arrangements to return the Midas muffler stock we ~~have on hand~~ as of December 31st. This shipment will be made on a C. O. D. basis. The mufflers to be returned may be examined by one of your representatives before shipment. Naturally we presume we will have the right to sell any mufflers not accepted for return.

I can assure you we are willing to cooperate fully with your request to terminate the Midas franchises we hold as of December 31, 1959.

To date we have returned approximately 2500 muffler plates and guarantees to your warehouse and have not received any credit for these. It is my understanding that you will allow credit for any muffler plates and guarantee returns up to January 10, 1959.

At this time we have a credit balance on our account in the amount of \$816.29.

We will make the return of mufflers to you provided you advise your acceptance and/or exceptions to the above-mentioned stipulations regarding the return of our Midas

muffler stock, as well as the status of the guarantee returns we have made.

Very truly yours,

PIERCE MUFFLER SHOPS INC.
J. C. PIERCE

JCP:dmb

401613

MEMO

FROM

MIDAS, INC. - State and 11th Streets - Chicago 5, Illinois

P-9-2278 APPENDIX 10A

July 1, 1957

57-117

TO: All MIDAS Representatives

FROM: Gordon Sherman

SUBJECT: Muffler Clamps and Hangers

The attached 1957 MIDAS MUFFLER CATALOG SUPPLEMENT is being sent to all of our MIDAS dealers. You will receive it through the mail along with them.

The most outstanding feature of this supplement is our complete listing of the most thorough MUFFLER CLAMP AND HANGER LINE in the industry. This is the result of intensive work over a long period of time and is meant to supply your MIDAS Shops with a line that is tailored to their every requirement through and through. It is a specialized line for MIDAS Specialists.

Now is the time that we step forward and formally ask that all of these parts be bought through MIDAS.

Clamps and hangers are as much-a part of our MIDAS line as our No. 779 mufflers. Clamps and hangers should be purchased through MIDAS as part of MIDAS membership. We have bulk packages for the more popular numbers, as previously announced, as so are able to offer these clamps to our people competitively with the legitimate market. Please see to it that this proper loyalty to the program is demonstrated by all of your shops and emphasize the value and completeness of this clamp and hanger line.

Gordon Sherman

MIDAS



MUFFLER

FOR THE GOLDEN TOUCH



MEMO

FROM



APPENDIX 7
MIDAS

MIDAS, INC. - State and 11th Streets - Chicago 5, Illinois

July 1, 1957

57-118

gdx 1957

TO: All MIDAS Representatives

FROM: Gordon Sherman

SUBJECT: Basic MIDAS Policy - EXCLUSIVENESS

As you know; as we have repeatedly impressed upon you from the very beginning of the MIDAS program; no side lines are allowed in MIDAS MUFFLER SHOPS.

It seems almost unnecessary that this basic principle of MIDAS should require re-emphasis at this late date but, for the sake of clarity, we are re-emphasizing it -

THE MOST SACRED PRINCIPLE OF THE MIDAS PROGRAM IS THAT ALL MIDAS SHOPS ARE MUFFLER SPECIALISTS, AND NO SIDE LINES ARE PERMITTED IN SHOPS THAT IDENTIFY THEMSELVES WITH THE MIDAS PROGRAM.

This refers to all services and products not directly related with automotive exhaust systems, and it includes such items as springs, brakes, non-exhaust accessories, shock absorbers, etc. etc.

It also refers, of course, to any merchandise not carrying the MIDAS brand.

Our policy in this matter is simply one of requiring that those people who are part of the program are part of it all the way. Anyone who defaults on this policy harms the program, weakens our formula of success and does himself no good, for this policy is directed toward the permanent and substantial progress of each individual MIDAS Shop. See to it that it is enforced and tell us where it isn't.

MIDAS



FOR THE GOLDEN TOUCH

Gordon Sherman



MEMO

Appendix 8

MIDAS, INC. - State and 11th Streets - Chicago 5, Illinois

157-135

July 24, 1957

TO ALL REPRESENTATIVES

The subject to be disclosed in this bulletin is one which, in the interest of discretion and good taste, we would not make known to you were it not that the embarrassment caused by it has already been made public.

Therefore, in the interest of your enlightenment, we present the facts regarding the MIDAS MUFFLER SHOP of Sarasota, Florida! Many of you and many of your MIDAS dealers have had occasion to note in a recent issue of the BRAKE SERVICE MAGAZINE an article discussing brake service in connection with a muffler shop in Sarasota, Florida. This was a MIDAS shop which conducted its brake service without our knowledge and allowed the magazine article to be printed without first notifying us. Because some of your loyal and enthusiastic MIDAS dealers may ask you of this matter, we feel you should know that, as a result of the violation of the MIDAS franchise and the embarrassing article describing it, this SHOP is no longer a member of the MIDAS program.

Gordon Sherman
Director of Sales



FOR THE GOLDEN TOUCH



LER

MIDAS URGENT MEMO

No. 06413

From GORDON SHERMAN To ED KELLERMAN Date 10-15-57

Subject: MIDAS "SUB-AGENCY" - INDIANA, Pa.

FOR OFFICE USE

11-5-57

PENDING DATE

3 7862

MO

The matter of wholesaling MIDAS mufflers has been taken up with all members of the N.A.C. and they have agreed to a policy which forbids it.

I am therefore sending the enclosed material back to you so you can make sure this policy is followed throughout your territory.

Certainly Johnson Bros. Garage and their supplier of MIDAS should have your initial attentions in this assignment.

178

SENDER'S FILE COPY

MIDAS URGENT MEMO

APPENDIX 12

No. 06434

From GORDON SHERMAN

To BERT HERSHEY

Date

10-28-57

Subject:

MIDAS MUFFLER SHOP, Manchester, N.H.

FOR OFFICE USE

11-15-57

PENDING DATE

I TO Subject ordered spark plugs. We do not ship these by policy.

I suggest you reaffirm this policy since subject must not

handle anything other than the merchandise supplied by us.

CCY

Plugs for Cadillac are for personal use. Other order for stock along with tips. Cancel stock order and ship personal order for Cady tips. Folloy was well reaffirmed today. ~~XXXXXXXXXXXXXXXXXXXX~~

XXXXXXXXXX

REPLY AND RETURN THIS SHEET TO SENDER

MIDAS URGENT MEMO

APPENDIX 13 No. 06437

From: GORDON SHERMAN

To:

BERT HERSKEE

Date: 10-29-57

Subject:

FOR OFFICE USE

11-29-57

PENDING DATE

9.25.73

ME: Speaking with my father on the phone regarding his current trip to the east, I was surprised to hear from him that some MIDAS shop in your territory has been picking up heavily at a local muffler warehouse. Of course this is not official, but the figure of \$600 in the name of Harcourt was mentioned. My father was not in a position to check in detail with his source of information and of course we turn to you. There is, without doubt, no area of greater violation against the franchise than this.

I should like to know if any evidence of such practice has come to your attention and of course I want you to be very alert to notice this sort of thing.

We'd like to take it for granted that our franchisees are loyal and, of course, your job is to see that the attitude of mutual loyalty prevails. As things stand now we are able to supply completely all requirements of our shops. They should buy nothing elsewhere and if they consider themselves compelled to "fill in" they should increase their stocks of basic material at once.

REPLY

f80

SENDER'S FILE COPY

MIDAS URGENT MEMO

Appendix 14
#50
RMG
No. 06780

From GORDON SHERMAN

To LEN REIS

Date 2-11-58

Subject:

MIDAS MUFFLER SHOP, PENSACOLA, FLORIDA

FOR OFFICE USE

2-28-58

PENDING DATE

MO

Mike Gup indicates that this shop is selling wholesale across the counter. You know, Len, from our NAC meeting, that this is in contravention of our policy.

Please give me a report on this.

OK

I was in Pensacola last Wed. and Thurs. and of course discussed this problem with Mike and Bill Fide. After investigating, I found that Bill has done a pretty good job of trying to keep his wholesaling within the Midas concept, and inasmuch as his is the most complete stock of tail pipes and exhaust pipes within a fifty mile radius of Pensacola, the dealers have been forced to call upon him despite their aversive sentiments. As you know, we love Mike and he is a good IP account, but we must keep those grains of salt handy to sprinkle over his complaints. You undoubtedly are aware that Mike has an installation shop too, and his advertising is for the shop, not for his wholesale end. The only opinion voiced by Bill regarding Mike's operation is "I hope this is worst competition I'll ever have." You also know that construction is under way for the new Midas Shop, and with any kind of break in the weather, Bill should be in it by April 1st. The solution to the whole problem, something

REPLY AND RETURN THIS SHEET TO SENDER

the
MIDAS
field
counselor

confidential memo from Gordon Sherman

MIDAS #58-564
March 31, 1958

MIDAS HOLLYWOOD MUFFLERS

We now have a complete stock of MIDAS Hollywood mufflers. In accordance with the NAC recommendations, these are unlabeled and unbranded. They merely show the stock number. A complete listing of these numbers and their applications has been prepared and a sample of it is attached to this bulletin. These listings are being sent to each of your dealers.

Now that we have this complete line of very acceptable packed-type mufflers, the time has come for us to enforce that policy which we have deliberately neglected until this time: We now require that all MIDAS Muffler Shops purchase their Hollywood mufflers from MIDAS exclusively. This is somewhat overdue since the convention last year, and we have long since prepared our dealers to accept this line as part of their overall participation in the MIDAS program. Take it from there.

the
MIDAS
field

counsellor confidential memo from Gordon Sherman

July 13, 1958
MIDAS #58-636

MIDAS HOLLYWOOD MUFFLERS

Are all of your MIDAS dealers buying their Hollywood mufflers and dual kit requirements from MIDAS?

They should, you know, insofar as we can provide this material. This was agreed upon long ago as basic to the program.

We now make a glass pack muffler that can more than support their esteem. We were frank to admit when we did not have such a muffler, but that is long past.

Please do not be casual or slipshod in attending to this part of the program.

PLAINTIFF'S EXHIBIT 41

TEXAS TAIL PIPE CO.

4310 Langley, P. O. Box 1107

Houston 1, Texas

Price List Effective July 31, 1958

Supersedes All Previous Lists

Phone: Hillcrest 2-2548

Jack Marshall

5 Maple St.

Salem, Mass.—PI 4-7167

FORD TAIL PIPES:	A-P	Mare- mount	Int'l	Walker	McCord	Jobbers	
						Blue Sheet List	Our Price
49 thru 51 All Models 6 & 8.	296	432	220	2055	1639	\$ 2.07	\$1.75
52 & 53 V8 All Models	408	544	540	2212	1655	2.07	1.75
54 Main & Custom 6 Cyl.	407	545	538	2211	1653	2.07	1.75
54 Main, Custom & Crest V8	445	598	704	2237	1749	2.39	2.00
55 Main, Custom V8	483	666	753	2327	1793	2.07	1.75
55 Fairlane, Right Hand	484	631	778	2321	1794	2.07	1.75
55 Fairlane, Left Hand	485	624	750	2322	1795	2.07	1.75

56 Fairlane, Right Hand
 56 Fairlane, Left Hand
 55-56 Sta. Wagon, Right Hand
 55-56 Sta. Wagon, Left Hand
 57 Ford Fairlane, Right Hand
 57 Ford Fairlane, Left Hand

578
 579
 482
 481
 765
 742
 655
 652
 2600
 2601
 830
 752
 2626
 2627

2.07
 2.07
 2.07
 2.07
 3.55
 3.55

1.75
 1.75
 1.75
 1.75
 2.65
 2.65

CHEVROLET:

51 & 52 6 Cyl.
 50 & 53 6 Cyl. Power Glide
 54 6 Cyl.
 55-56, 6 & 8
 50-53 Incl. 1½ Ton Pickup

328
 327
 440
 490
 335
 441
 385
 576
 632
 575
 467
 428
 662
 745
 499
 2070
 2091
 2235
 2286
 2277

1.92
 1.92
 1.92
 1.85
 1.39

1.70
 1.70
 1.70
 1.70
 1.23

PLYMOUTH:

51-52 Mod. P 23
 53 Mod. P 24
 54 Mod. P 25
 55-56, 6 Cyl. Mod. P 26

444
 428
 467
 506
 484
 523
 568
 659
 224
 575
 714
 2417

2.26
 2.26
 2.26
 2.26

2.00
 2.00
 2.00
 2.00

MERCURY:

55-56, Right Hand	520	667	783	2317	1803	2.83	2.50
55-56, Left Hand	522	700	785	2315	1773	2.83	2.50
55-56 Sta. Wagon, Right Hand	551	704	818	2318	1851	2.83	2.50
55-56 Sta. Wagon, Left Hand	550	775	817	2316	1852	2.83	2.50

TERMS: 1%—10th Prox., TAX included.

WE WILL PUT NUMBER OF MFRG. THEY ARE
BUYING FROM ON EACH TAIL PIPE.

~~DELIVERED~~ PRICES—MINIMUM ORDERS OF 50
PIPES.

Above prices are freight allowed in the states of:

Texas, Oklahoma, Louisiana, Arkansas, Missouri, Kansas,
Georgia, Alabama, Florida; Mississippi, Tennessee,
Kentucky, North Carolina, South Carolina, Virginia, West
Virginia, Iowa, Nebraska, Illinois, Wisconsin, Minnesota,
North Dakota, South Dakota, Indiana, Ohio, Pennsylvania,
New York, New Jersey, Maryland, Delaware, District of
Columbia, Michigan, Massachusetts, Rhode Island,
Connecticut, Colorado and New Mexico.

(THESE PRICES ARE SUBJECT TO CHANGE OR
WITHDRAWAL WITHOUT NOTICE)

the
MIDAS
field
counselor

confidential memo from Gordon Sherman

August 13, 1958
MIDAS #58-650

TEXAS TAIL PIPE CO. OF HOUSTON

I have attached to this bulletin a circular, a copy of which has been sent to all MIDAS Shops.

The Texas Tail Pipe Co. of Houston is a bit of a scavenger (there is nothing wrong with being a scavenger except that we do not like them) to the muffler industry. These people make a small assortment of popular numbers and distribute them at unjustifiably low prices.

It is of course essential to participation in the MIDAS program that our dealers do not buy this merchandise.



HEADQUARTERS FOR THE MIDAS MUFFLER SHOP NETWORK

4101 West 42nd Place, Chicago 32, Illinois

LOUIS GURNICK
580 Kincaid
Highland Park, Illinois
Phone IDlewood 2-6408

9/26/58

Dear Max,

After receiving a very frightened letter from Jim Madison I called him. It seems he is ready to flee the coop. He is so petrified that I am sure he will abandon his Minneapolis residence. Of course, Midas will compensate him for the merchandise. We do not want the Midas mufflers falling into strange hands. It won't do any of us any good to "push" Mr. Madison. He would so broke in the near future. We have to set up there next week to lead a guiding hand.

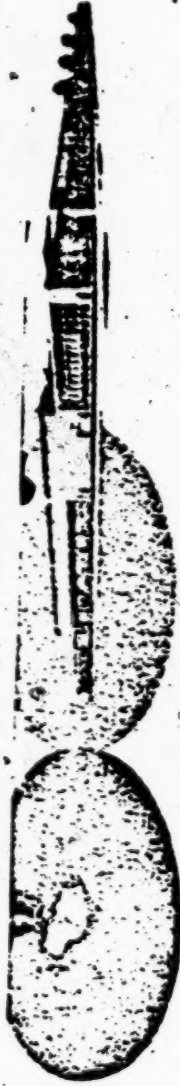
After doing some "tall thinking" I have come to the conclusion that you and I should have a meeting first before any meetings are held in Chicago.



MUFFLER INSTALLATION DEALERS ASSOCIATED SERVICE

Sheet #1

1275 E. 42nd St. Chicago 32, Ill.



HEADQUARTERS FOR THE MIDAS MUFFLER SHOP NETWORK

4101 West 42nd Place, Chicago 32, Illinois

LOUIS GURNICK
580 Kincaid
Highland Park, Illinois
Phone: IDlewood 2-6408

There is a great deal to be done before Gordon is drawn into the picture. I really think it would be premature to have a top level meeting now. Many things have to be considered such as the cities like Benton Harbor, Battle Creek, Holland and another step in Grand Rapids — before we can think of any cities outside of Western Michigan. The three volumes in Michigan and Kalamazoo have not been exploited to the fullest extent — what about the glass business which is against Midas policy? These points are in the limelight. I do want achieve your objective

more fully and concretely if we could resolve the above matters and then invite Gordon to Michigan to show him the progress, and then your long range vision could be fulfilled — it's like to hear from you.

MIDAS

MUFFLER INSTALLATION DEALERS' ASSOCIATED SERVICE

the
MIDAS
field

counsellor

confidential memo from Gordon Sherman

MIDAS #58-677
October 15, 1958

BUYING FROM OUTSIDE SOURCES

Several bulletins have gone forward to you describing the possible dereliction of some dealers in the direction of tail pipes and clamps of non-MIDAS origin. In a recent trip I have had opportunity to observe this felony and can now tell you what to look for.

The Texas Tail Pipe Company continuously circularizes our dealers. Tail pipes are all but anonymous except for the identifying band or label. The Texas Tail Pipe Company has a yellow "scotch tape" type band with red printing. This looks something like the type of tail pipe identification band that we use for pipes sold with dual exhaust kits...while our regular color scheme is merely black print on white tape. We use the yellow and red combination to indicate to the dealer that the pipe on which it appears belongs with the dual kit and should not be sold separately.

The Texas Tail Pipe Company also identifies pipes with a small strip of yellow scotch tape that does not completely encircle the pipe. While this identification may be deceiving at first glance, it will be clear on any kind of inspection and you are urged to be alert to it.

The purchase of such pipes is usually done in quantity since only a few numbers are listed by this scavenger company and a significant quantity is required for economy in shipment. We regard this kind of promiscuous buying as a capital offense in MIDAS. It is inexcusable and it is hostile in the extreme to the program. You cannot work with a dealer if this kind of thing prevails.

APPENDIX 4

October 15, 1953

MEMO TO: MIDAS DEALERS
FROM: LOU GURWICK
SUBJECT: SHOP BUYING PRACTICES

- 1) It is Midas policy that you buy your clamps exclusively from Midas.
- 2) It is Midas policy that you buy your "Hollywood Mufflers" from Midas.
- 3) It is Midas policy that you buy your tailpipes from Midas.

Your complete participation in the Midas Shop Buying Policy is requested.

The next time I visit your shop, we can go into this matter more fully.

LG:J

646940

MIDAS URGENT MEMO

3/31/59
4-18-61
W 7.5

No. 10627A

Re: Guruch To: Max Ross

Date: 10/31/59

Subject:

FOR OFFICE USE
PENDING DATE

Clamps - Purchase of
by Grand Rapids.

MEMO

Gordon: Herman advises you are not purchasing popular clamps from Midas. You are only purchasing a small quantity of special type clamps. The clamps are priced right, and even more important it is part of the policy to make sure. Please supply and cooperate in the future. - pay any ideas to the contrary please let me know. I have report the results to Gordon, Shannon.

REPLY

194

REPLY AND RETURN THIS SHEET TO SENDER

the
MIDAS
field
counselor

APPENDIX 15

confidential memo from Gordon Sherman

March 25, 1959
MIDAS #59-1053

TAIL PIPE PURCHASES

When a dealer signs a franchise with us he commits himself undeniably to certain basic practices in our program. Paramount among these is his consistent and exclusive purchase of our products. Our dealers have become so dedicated to our mufflers that I believe there is no question on this, but it is possible that some of them regard our tail pipes and our clamps as a kind of afterthought to which "loyalty" does not apply. You have all been aware of this as you also have been aware of certain tail pipe companies who manufacture short lines of easily produced numbers at discount prices.

(On the other hand, many of our newer dealers, while fulfilling this aspect of their franchise commitments, have simply not sold enough tail pipes at all. We believe that this is so because as inexperienced dealers they tend to think of their business primarily in terms of mufflers and have not learned how to "sell" in the sense of examining their customers' entire exhaust system needs.)

[These two separate factors then combine to reduce to some uncertain degree our sale of tail pipes and clamps in MIDAS.]

To help you isolate those dealers in need of attention along either of the lines I have indicated, we have been studying each and every MIDAS order as it is processed for shipment. We shall continue to do this indefinitely. It is this procedure that enables us to discover that for one reason or another some dealers are not buying "enough" pipes from us. We now have our first report from this project and are printing below the locations of those in question as follows:

West Springfield, Massachusetts	Port Arthur, Texas
Albuquerque, New Mexico	Norfolk, Virginia
Raleigh, North Carolina	Roanoke, Virginia
Philadelphia, Pennsylvania	Syracuse, New York
Pittsburgh, Pennsylvania	New Orleans, Louisiana
Florence, South Carolina	Oakland, California
Spartanburg, South Carolina	San Diego, California
Memphis, Tennessee	San Jose, California

PLAINTIFF'S EXHIBIT 4.

MIDAS, INC.

Headquarters for the Midas Muffler Shop Network
4101 West 42nd Place, Chicago 32, Illinois

May 26, 1959

Mr. Max Ross
Midas Muffler Shops
1020 E. Columbia
Battle Creek, Michigan

Dear Max:

It is the purpose of this note only to acknowledge your letter of May 23rd and its enclosure.

I have brought the subject of your letter to the attention of Lou Gurnick, asking him to explain our views on the subject and express our wonderment that you should feel restricted by the Midas maintain-the-price merchandising. I feel that Lou could do this better in person.

Meanwhile, with kindest regards and best wishes for your unhampered progress in Battle Creek, I am

Sincerely yours,

Gordon

Gordon Sherman

GBS:af

c/c Lou Gurnick

the

MIDAS

field

counselor confidential memo from Gordon Sherman

October 4, 1939
MID... story
11/29

MEETING

I have talked with many of you this past week about a meeting and in most cases we concluded that it is downright urgent...hence the bulletin written to you by Bud Jacob announcing our Field Counsellor meeting on Sunday, October 15th.

We have not yet planned the meeting and we are not sure that we will at all. All eight of you will be present, together with Bud Buchanan and Ernest Kuhn, Assistant Field Counsellors. Bud, Hal and I will complete this intimate group with perhaps an occasional visit from Bill Lundin and Dave Silbert.

The meeting will be informal and not likely un-attended; but we want its discussions to center around a basic, critical area in program planning:

We must re-appraise our relationship with our dealers with a view to greater program security.

We must be prepared to redirect our philosophy of leadership if so think it necessary, and we must be prepared to make tangible changes within the program structure itself if our philosophy so directs.

Almost every one of you has an interesting story or two to tell arising from your recent adventures with your dealers and tending to offer all of us important material for consideration as we re-evaluate our status.

Here, opposite each of your names, are the stories that I want you to be prepared to tell briefly and factually:

BURT GRACE

The Claude Stibbs story.
Luke Lotherington - source of a new policy.
Lou Silverman wants it all.
The Herb Gaines-Al Green story.
How things stand with Greg Skarup.

LOG GUNNICK

The facts on Claude Wheeler.
Max Foss wants a fifth shop.
Max Foss cuts up in Battle Creek.
Splitting Fritchhall's market.
Securing a new dealer in Omaha.
Vengeance in Lansing.

IRVIN LINS

Debunking George Connos.
The Harold Koordnoch story...the new shop
and our option to buy his old shop.
Warren Pickering's second shop.

MEETING

9 0:55

October 8, 1952
MIDAS #1187

HUGH MACLEAN

The Hilt Abramson history.
Recent developments with Johnny Rodosta.

LEONARD SELIGER

Catching up with the Katz brothers.
The Saul Doppelt switch in shops.
Securing Columbus locations.

HOWARD SHERMAN

Breaking our expansion commitment
with Herbert Marchick.

MARC VOSK

How much can we take from Joe Pierce? A
report on springs and shocks in Buffalo.

KEN WARSCHOFF

Hysteria in Louisville.

BUD JACOB

After Brodie's hide in Detroit

I do not mean that there will be a straight presentation of all of these stories one after another. They do represent a catalogue of very significant experience, and I ask that each of you be prepared to present them so as to illustrate the lessons they tend to teach. It is from these experiences that we shall try to discover what's to become of us.

I don't know how long the meeting will last. I trust that its very informality will make for a kind of relaxation which may make it longer but more pleasantly productive...maybe through Tuesday afternoon.

One more thing: I hope that our approach will be so clearly focused on this single problem area that we shall be able in our virtuosity of decision-making to particularize our conclusions.

I mean that I want each of you to come away with specific courses of action in solution to specific problems that every one of you now faces with certain of your dealers. Therefore please bring with you a list of each of the shop owners in your territory and each of the shops. We may ask each Field Counsellor to review his list on the spot as we come upon a problem or proposed solution to see how it might apply to any shop in his territory.

Our usual tendency is to scan, mentally, the entire country or our own territory as we come upon a certain area of thought. This is what I would like to avoid this time. While the problem of dealer expansion and control is an abstract one, it is presenting real challenges to each of you. Let's see if we can leave the meeting with very real solutions to each of them. Prepare your lists carefully and clearly.

the
MIDAS
field
counselor

confidential memo from Gordon Sherman

December 10, 1959
MIDAS #59-1220

JOE PIERCE...

From all present indications, Joe Pierce's separation from the program is taking place without incident.

I am sorry that I did not give you more urgent instructions to review this entire case with your dealers even if they did not ask you to review it. My reaction to some of the reports that I now have is that many of you have neglected to review it and have left too much to chance and to the misinterpretation of others.

I did not mean, nor do I mean now, that you should race about your territories breathlessly and defensively explaining our position to everyone. I have conceived of it as possible that in the normal course of your visits with every dealer, the elements of this case be reviewed as a matter worthy of attention so that you can at least be sure your dealers have received the word from you instead of from the "boys in the alley."

The active efforts to misinterpret our motives in this case have made many believe that Joe was cancelled without any provocation and without any notice. This should be clarified. Marc Vosk had attempted to work with Joe for one year. He had been repeatedly "stood up," sometimes to his greatest inconvenience, so that no relationship was possible even on the mere physical level of meeting with each other. Joe Pierce carried this to extremes when he promised to be at the last New York regional meeting and failed to show. Here he was, even "standing up" his fellow dealers.

I am not asking you to treat this by reviewing every particular in a nervous list of offenses, and so I will not do so here. I have only tried to indicate that the respect and basic relationship with the Field Counsellor...and therefore with the program...were lacking, and that this constitutes one of the reasons why we took the action we did. We did our utmost to work with Joe Pierce during an entire year...His rejection of the program took place, in effect, long before our rejection of him.

In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1966, JANUARY SESSION, 1967

No.-15862

PERMA LIFE MUFFLERS, INC. *et al.*,
Plaintiffs-Appellants,

v.

INTERNATIONAL PARTS CORPORATION
et al.,

Defendants-Appellees.

Appeal from the
 United States District
 Court for the
 Northern District
 of Illinois, Eastern
 Division.

April 25, 1967

Before MAJOR, *Senior Circuit Judge*, and SCHNACKENBERG and CUMMINGS, *Circuit Judges*.

MAJOR, *Senior Circuit Judge*. Plaintiffs brought this action in a three-count complaint for the recovery of damages allegedly sustained by reason of defendants' violation of the antitrust laws of the United States. They alleged in counts 1 and 2 that the terms of certain franchise agreements executed by the parties to govern their relationship in the purchase and sale of automotive exhaust systems parts through establishments displaying defendants' trade and service marks, "Midas" and "Midas Muffler Shop," illegally restricted plaintiffs in the operation of said shops. They alleged that the corporate and individual defendants joined in an illegal conspiracy to restrain trade, in violation of Sec. 1 of the Sherman Act (Sec. 1, Title 15 U.S.C.A.), and that they violated Sec.

3 of the Clayton Act (Sec. 14, Title 15 U.S.C.A.). They alleged in count 3 that the defendants violated Sec. 2 of the Clayton Act, as amended by the Robinson-Patman Act (Sec. 13, Title 15 U.S.C.A.), by granting discrimination in price and service to certain of their customers without offering or otherwise making available these same prices and services to plaintiffs.

The District Court, on a voluminous record and after numerous protracted hearings, sustained defendants' motion for summary judgment as to all counts. In its order entered May 24, 1966, from which the appeal comes, the Court held (1) that plaintiffs were in *pari delicto* and, therefore, without standing to complain about violations of Sec. 1 of the Sherman Act and Sec. 3 of the Clayton Act, and (2) that defendants' price and service discrimination did not constitute a violation of the Clayton Act, as amended by the Robinson-Patman Act.

Of the multiple plaintiffs, only four, Gregory Skarupa, Maxwell Ross, Joseph Pierce and Claude Wheeler, are here as appellants. Each of the plaintiffs, as well as others, was licensed under a franchise agreement with defendants to use the trade name, trademarks and service marks identified as "Midas" and "Midas Muffler Shops," in businesses which they operated in various states. Each plaintiff voluntarily entered into his first franchise agreement, and subsequently each sought and obtained franchises for additional shops.

The defendants were International Parts Corporation, three of its subsidiary corporations, plus six individual officers or agents of the corporate defendants. These ten separate legal persons constituted a single trading entity by which Nathan Sherman and his son, Gordon Sherman, conducted their family-owned business, including the sale of automobile exhaust systems.

In support of their motion for summary judgment, defendants presented to the District Court a 9-page detailed affidavit of the two Shermans, defendants and chief executive officers of the corporate defendants, and a 31-page appendix of excerpts from plaintiffs' depositions, answers to interrogatories or other record sources. Neither the affidavit nor the contents of the appendix

was challenged by the plaintiffs in the court below by counter-affidavits. Plaintiffs relied upon documentary proof, their deposition testimony and defendants' answers to interrogatories.

Judge Abraham L. Marovitz in a memorandum opinion, after a meticulous analysis of the factual situation and the case law, with reference to counts 1 and 2 stated:

"It is clear from the undisputed facts before us that each plaintiff voluntarily entered into the franchise agreement at issue and accepted the benefits therefrom. They are, under the holdings in *Rayco* [234 F.Supp. 593] and *Crest* [246 F.Supp. 224] *in pari delicto* with defendants, and therefore unable to reap the harvest of their own misdeeds. Each plaintiff recognized that the franchise conveyed to him the right to use the various Midas trade names, trademarks and service marks, and each profited from the use of same. They are not now entitled to the high profit of a treble damage suit when they voluntarily acceded to, fostered, and profited from the very practice about which they now complain."

Subsequent to the entry of the judgment in the instant case, *Crest* was affirmed by this Court. *Crest Auto Supplies, Inc. v. Ero Mfg. Co.*, 360 F.2d 896.

In allowing defendants' motion for summary judgment on count 3 of the complaint, the District Court concluded:

"... that any alleged difference in price or service between purchases by plaintiff of Midas brand exhaust parts and purchases by other persons of Midas or International brand parts from defendant did not constitute a discrimination violative of the Robinson-Patman Act, in that (a) plaintiffs did not compete with other purchasers of Midas brand parts; (b) plaintiffs had the opportunity to purchase either brand; and (c) the Midas exhaust parts system was unlike the International system in grade and quality."

We think the Midas history, taken in the main from the unchallenged affidavits of Nathan and Gordon Sherman, is relevant. International Parts and the other defen-

dants composed the single business entity by which the Sherman family sold exhaust parts. Prior to the Midas franchise plan, which defendants originated in 1955, exhaust system parts were sold to consumers from innumerable retail outlets, such as garages and service stations. A muffler was merchandised like most other automotive replacement parts, was given no special attention, enjoyed no consumer brand consciousness and required a labor charge for installation. All of this was changed by the introduction of Midas, with its nationally advertised trade names, nationwide chain of specialized exhaust system shops, unique guarantee and free installation.

A network of franchised dealers, each of whom purchased directly from International Parts and owned a retail outlet identified by the various "Midas" trade names and service marks, invited the public to a nationwide chain of automotive shops specializing in exhaust system parts. The dingy surroundings of the typical auto repair shop were replaced by the Midas atmosphere of cleanliness, comfort and prompt, courteous service. The guarantee of a new Midas muffler free to replace any that wore out as long as the customer owned the car was to be honored in each shop no matter where the first muffler was purchased.

Success for this new merchandising concept, and for each Midas dealer, necessitated that the American motorist recognize the Midas name and have confidence that each dealer was an exhaust specialist who handled the same quality product, provided the same clean and comfortable surroundings, gave the same prompt and dependable service and honored the same unique Midas guarantee. Millions were spent by defendants and the Midas dealers on national and local advertising to publicize this Midas story.

A franchise agreement was tendered to each prospective dealer. It required no franchise fee, construction expense or purchase of capital equipment from defendants, and it was cancellable by either party on 30 days' notice. No lease of real estate or other equipment from Midas was required; the franchise was a contract for the purchase of Midas products for resale from a retail outlet licensed by defendants to use the trademark "Midas"

and the service mark "Midas Muffler Shop." Unlike the traditional auto repair shops that purchased through middlemen, the Midas dealers purchased at a significantly lower cost directly from International Parts.

A national association of Midas dealers and a monthly magazine allowed each dealer to learn about and profit from the experiences of his fellow dealers and to visualize better the national Midas image. Select dealers, including plaintiffs, who were most interested in this image and who had attained the greatest success, were members of a dealers' National Advisory Council. International Parts employees, called Midas field counselors, were used to assist the dealers.

After obtaining their first Midas franchise agreement most dealers, including plaintiffs, subsequently opened additional shops. Virtually every dealer, particularly plaintiffs, enjoyed substantial monetary gains from participation in the Midas program.

The gist of plaintiffs' argument appears to be embodied in the following statement taken from their brief:

"Appellants operated under their agreements with appellees retailing and installing the Midas mufflers from 1955-56 to 1959-60. During this period appellees sold appellants the Midas muffler with its lifetime guarantee. In return appellees required appellants to retail the muffler at prices fixed by appellees and to honor muffler guarantees on presentation. Appellants were also required to deal exclusively with appellees. To purchase the Midas muffler, appellants were required to purchase all other exhaust parts items from appellees. At the same time appellees refused to sell appellants or permit them to handle the International muffler (which also carried a lifetime guarantee) or any automobile parts other than automotive exhaust systems parts. Moreover, appellees also refused to allow appellants to purchase from any of appellees' competitors."

So far as we are able to discern, no claim is or ever has been made by plaintiffs that any restriction was imposed by defendants other than those provided in the franchise agreements.

Plaintiffs in their reply brief, apparently in recognition of the damaging effect of the undisputed testimony of the great benefit and profits which they derived from the Midas program, narrow the issue considerably. They characterize defendants' argument in this respect as "spurious." The brief states:

"The practices about which the appellants complain are appellees' exclusive dealing and resale price maintenance practices, and not, as appellees suggest, the program as a whole. Appellants were required to pay more for exhaust system parts which they purchased from the appellees than they would have paid had they been free to purchase these same parts from competitors of the appellees. This is the practice about which the appellants complain. It is difficult to imagine how appellants could have profited from such a practice."

Assuming there is any factual basis for this assertion, which is disputed, restrictions about which they complain were contained in the franchise agreement to which each of the plaintiffs solemnly subscribed.

The four plaintiffs operated in separate areas of the nation, were previously unacquainted with each other, and all participated in the Midas program in a similar manner. Each of the twenty shops operated by plaintiffs bore the name, "Midas Muffler Shop," and displayed Midas advertising material. National advertising by defendants covered plaintiffs' markets and was supplemented by plaintiffs' local advertising.¹ Each of the plaintiffs was at one time a member of the National Advisory Council. Plaintiffs Skarupa, Ross and Wheeler on 30 or 60 days' notice abandoned the Midas program, as permitted under the franchise agreement, and entered the Robin Hood program.² Pierce's franchise was terminated by Midas, on an *agrécable* basis, and he entered the Robin Hood program.

¹ The national advertising expenditure by defendants from 1956 through 1960 was \$3,570,424. Advertising was in numerous national magazines, as well as by radio and television programs. Much of the latter was done over stations in the areas in which plaintiffs operated.

² The Robin Hood franchise program was sponsored by a competitor of International Parts Corporation. Its dealers sold items other than exhaust systems and there was no manufacturer's guarantee on the featured muffler.

The deposition testimony of each of the plaintiffs is highly significant and, standing alone, completely refutes any notion that their participation in the Midas program was other than on a voluntary basis, or that they were coerced in pursuing a course which they now claim was illegal and for which damages are sought. A brief resumé of such testimony will suffice.

Skarupa in 1955, while employed by the Veterans Administration, sought defendants' guidance in opening a muffler shop in the Washington, D.C. area. He was so enthusiastic about the prospect that he organized Perma Life Mufflers, Inc., and on April 10, 1956, was granted his first Midas franchise. He testified, "I was interested in the Midas program provided I got assurances that the Washington metropolitan area would be assigned to me so that if I developed it I could reap the benefits of such development." Skarupa executed three more Midas franchise agreements within two years, and then terminated his four franchises because he could not obtain franchises for three more Midas shops he wanted to open. He mainly complained that he was limited in his further expansion in the Midas program. He wanted to monopolize and profit from every possible Midas shop in the Washington area. When defendants refused his request in this respect, he terminated his Midas franchise and joined the Robin Hood program. Skarupa's profit during the years he participated in the Midas program was \$200,000. In the present action, he seeks an additional \$800,000 in damages suffered as a result of the alleged ill treatment accorded him by defendants. He also seeks damages in the amount of \$60,000 per year because of defendants' refusal to grant him three additional franchises.³

Ross became a highly paid executive of a profitable chain of four Midas shops in Michigan. He wanted the Midas image, the guarantee, the advertising and the quick service. He recognized that merchandising exhaust parts by national advertising was originated by Midas

³ Skarupa's answer to Interrogatory II: "Plaintiffs were not permitted to satisfy the demand for additional muffler shops in the Washington Metropolitan Area. Had they been permitted to, plaintiffs would have opened three additional shops which would have had additional sales of approximately \$100,000.00 per year each, or a total additional sales of approximately \$300,000.00 per year. Net profit would have averaged 20% per year. Damages: \$60,000.00 per year."

and that by his participation in the Midas system his business gained a valuable image of substance and credibility. To Ross, the franchise "meant that I thought that this was a good idea, I thought that it was a way of making some real money if I got into it quickly. . . . The thing that excited me was the guarantee . . .," and was "an avenue for sales and profit for me." He was so well satisfied with the program that he acquired two additional franchises for shops in Minneapolis for the reason, "Well, I had a good measure of success in the Muskegon and Grand Rapid areas. I liked the program. It was making money for me. I wanted to get in a larger metropolitan area, and Minnesota was open. I wanted not only the Minneapolis [area] but [also] St. Paul." He offered to construct a new building to house a Midas shop, if granted another franchise. He continued under the Midas program until offered what he thought was the less restrictive Robin Hood franchise, and then terminated his franchises with Midas.

Pierce was operating three muffler shops in upstate New York when he learned about the Midas program, for which he sought and was granted franchises. Within one year he obtained three more franchises, giving him a chain of six Midas outlets in five cities. He organized and did business under three corporate names, Muffler Sales and Service, Inc., Midas Muffler Sales and Service, Inc., and Pierce Muffler Shops, Inc. He was so well satisfied with the program that he attempted to obtain a franchise for a friend. Some controversy arose between Pierce and defendants, and his franchises were cancelled by defendants, without objection by Pierce.

Wheeler, located in the St. Louis area, learned of the Midas program through an advertisement and requested a franchise, which was granted. He sought more franchises so that he could preclude prospective Midas dealers from entering the St. Louis area. Within twelve months of opening his first shop, he had signed two more franchise agreements. Wheeler terminated his franchises and joined Robin Hood because defendants would not give him exclusive rights in the St. Louis area.

Plaintiffs' radio, television and newspaper advertisements demonstrate their participation in and cooperation

with the defendants in the programs of which they now complain. In the sake of brevity, we refer only to those by Skarupa which are typical of the advertising of all plaintiffs:

"Member America's Only Coast-to-Coast Network of Exclusive Auto Muffler Shops."

"... we're specialists in just one thing—your car's exhaust system ..."

"ANNOUNCING! The Newest Member of The Great National Network of Midas Muffler Shops."

"Look for the MIDAS Sign—America's only coast-to-coast network of exclusive auto muffler shops."

"... visit any one of Washington's three MIDAS MUFFLER SHOPS. Famous MIDAS mufflers come to you ... installed FREE within fifteen minutes, while you watch ... with a written guarantee from the factory for the lifetime of your car. It's a guarantee that follows you around the United States, to more than 200 cities bearing the MIDAS MUFFLER SHOPS sign ..."

"... MIDAS dual exhaust specialists will convert your present single exhaust system to a dual, in practically no time at all. You see, MIDAS exhaust experts perform in minutes the work ordinary garages and dealers take hours to do ..."

After reviewing plaintiffs' testimony, the District Court stated, "Under no circumstances could 'coercion' be said to have been a factor herein." We think that conclusion is inescapable. Moreover, their testimony supports the Court's finding, "They voluntarily acceded to, fostered, and profited from the very practice about which they now complain."

In support of their argument that the *pari delicto* defense is not available to antitrust defendants, plaintiffs on brief rely heavily upon and discuss at great length *Simpson v. Union Oil Co. of California*, 377 U.S. 13, 84 S.Ct. 1051, reversing 311 F.2d 764. They argue that *Simpson* "is dispositive of the *pari delicto* issue in this

case." We have read and reread this opinion, and do not agree. The Court does not mention *pari delicto* and we think it did not intend to annihilate a principle so long embedded in the law.

It appears that the hard-core basis for the Court's decision resides in the fact that Union Oil was in a position by means of a lease to coerce Simpson to sell at prices fixed by Union Oil. Simpson was a retail dealer and leased from Union Oil the premises on which he did business. At the same time, he executed a consignment agreement with Union Oil. Both the lease and the agreement were terminable by either party at the end of any year, and the consignment agreement by its terms ended upon cancellation of the lease. As to this arrangement the Court stated (page 21):

"By reason of the lease and 'consignment' agreement dealers are coercively laced into an arrangement under which their supplier is able to impose non-competitive prices on thousands of persons whose prices otherwise might be competitive."

When Simpson refused to comply with the terms of the consignment agreement, Union Oil cancelled his lease. By this action Simpson was deprived not only of the right to purchase from Union Oil but simultaneously of a place to do business. The Court concluded its opinion by stating (page 24):

"We intimate no views on any other issue; we hold only that resale price maintenance through the present, coercive type of 'consignment' agreement is illegal under the antitrust laws, and that petitioner suffered actionable wrong or damage."

Without restating the facts of the instant case, it is sufficient to note that they are a far cry from those considered by the Supreme Court in *Simpson*.⁴

Plaintiffs on brief argue that the decision here under attack is not only contrary to the decision of the Supreme

⁴It is significant that *Simpson*, decided by the Supreme Court more than two years prior to our decision in *Crest*, was not relied upon, not even cited, by the parties in *Crest*, either in the District Court or in this Court. *Simpson* was also not relied upon by either party in *Florists' Nationwide Telephone Delivery Network v. Florists' Telegraph Delivery Association*, 371 F.2d 263, 267, in which we reaffirmed the *Crest* rule.

Court in *Simpson* "but also contrary to the substantial weight of authority." We think the weight of authority is in the opposite direction. However, we see no point in citing or discussing plaintiffs' cases on this score inasmuch as in our recent decision in *Crest* (360 F.2d 896) we considered the same contention and in the main the same cases as are relied on here. In *Crest* we stated (page 900):

"Plaintiffs refer to a 'feeling' in 'all the Courts' against the *pari delicto* rule in private anti-trust cases. The only animus we detect in the courts on the *pari delicto* question is directed at protecting those who are coerced into illegal agreements . . . [citing cases], or at permitting suits where the defense is the unclean hands of a plaintiff in transactions other than the one in suit, as the Supreme Court held in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214, 71 S.Ct. 259, 95 L.Ed. 219 (1951). But where a plaintiff participates freely in the alleged anti-trust conduct, the *pari delicto* rule precludes recovery. [Citing many cases.] As Judge Soper said in *Pennsylvania Water*, 209 F.2d at 134, the doctrine that a plaintiff who is a voluntary party to the allegedly illegal agreement which forms the basis for the anti-trust suit cannot recover thereon was 'firmly established in earlier cases,' and still remains to be given effect in appropriate actions."

Plaintiffs on brief assert that the *Pennsylvania Water* decision cited and quoted from by this Court in *Crest* "was inferentially overruled" by the same Circuit in its subsequent decision in *Osborn v. Sinclair Refining Co.*, 286 F.2d 832, cert. denied 366 U.S. 963. We think in this plaintiffs are mistaken. In *Osborn*, there was no written franchise contract agreement or other form of arrangement by which the plaintiff obligated himself to be bound. More than that, the Court found that the grievance of which plaintiff complained was the result of coercion. No *pari delicto* defense was involved and, obviously, the Court did not overrule its previous decision in *Pennsylvania Water*.

Plaintiffs' reliance upon *Bales et al. v. The Kansas City Star Company et al.*, 336 F.2d 439, is even more

pointedly misplaced. In that case the Eighth Circuit, in a decision rendered five months after that of the Supreme Court in *Simpson v. Union Oil Co.*, 377 U.S. 13, gave recognition to the doctrine of *pari delicto* as a defense. The Court stated (page 444):

"Of course, if the plaintiffs actually were in *pari delicto* with the defendants in the alleged endeavor of the Star to prevent competition and create a monopoly for itself in the area, the law should leave them where it finds them. But if they accepted the contract restriction only in business necessity and not in any sanction or furtherance of a trust endeavor by the Star, they would not be in *pari delicto* for purposes of the right to recover for such provable injury to their businesses as the Star's antitrust violation had occasioned." (Citing numerous cases, most of which we cited in *Crest*.)

In resumé, each plaintiff initially asked to become a participant in the Midas merchandising program and voluntarily, willingly and knowingly executed his first Midas franchise agreement. Each plaintiff thereafter eagerly sought additional shops in the Midas program and voluntarily executed additional franchise agreements for such shops. Each plaintiff at all times had the legal right to abandon the Midas program and to cancel these franchise agreements on 30 days' written notice. Three of the instant plaintiffs unilaterally terminated their franchises when it suited their convenience and the fourth acquiesced in the termination of his franchise. Furthermore, each plaintiff cooperated with defendants and all other Midas dealers in the conduct which plaintiffs now assert was illegal and injurious to their business and property. Each plaintiff accepted the benefits arising out of the franchise agreements and earned substantial and significant profits during the terms of such agreements. Each plaintiff sought to perpetuate the "wrong" of which he now complains by acquiring additional franchises, and Skarupa makes the contradictory claim that he is entitled to damages not only because of the "wrong" he suffered while a party to and operating under franchise agreements but also because additional franchises which he sought were denied. Presumably, he was so well

satisfied with the ill treatment which defendants assertedly imposed upon him, that he sought the opportunity to suffer more of the same treatment."

It would be difficult to visualize a case more appropriate for the application of the *pari delicto* doctrine. We hold that it was properly applied and given effect by the District Court.

The District Court further held as an alternative basis for the dismissal of count 1 of the complaint that no conspiracy existed as a matter of law. The Court found that the corporate and individual defendants were a single business entity through which a family business was operated. Based on this factual premise, with which plaintiffs take no issue, the Court, citing *Nelson Radio & Supply Co., Inc. v. Motorola, Inc.*, 200 F.2d 911, 914, held as a matter of law that no conspiracy as alleged in the complaint existed. At the same time the Court recognized, "While we agree with plaintiff that subsidiary corporations may under certain circumstances 'conspire' to violate the antitrust laws, the record before us indicates by uncontested facts that no such conspiracy was present here."

Plaintiffs in support of their argument on this point rely upon *Kiefer-Stewart Co. v. Seagram & Sons, Inc. et al.*, 340 U.S. 211, which they claim involved the same type of conspiracy as that alleged here. In that case, while it appears there was common ownership and control of the corporate defendants, there was no finding such as we have where all the defendants were acting as a single business entity. As the District Court stated:

"There is no evidence, except in plaintiffs' unsupported arguments that these corporations competed with each other or acted in any manner other than as a single integrated business. There are no acts alleged which could not have been done by a single corporation acting alone. Plaintiffs may not by mere pleading allegations and conclusions fragmentize a unified business to meet the conspiracy requirements of the Sherman Act."

We agree with the reasoning and hold that count 1 was properly dismissed on this alternative basis.

Defendants argue as a further defense that the Midas franchise agreements, and the merchandising methods employed by plaintiffs, defendants and the other Midas dealers in connection therewith, were reasonable and legal means to protect the various Midas trade names, trademarks and service marks licensed to plaintiffs by such franchise agreements, and that such agreements and merchandising methods were not prohibited by the Sherman or Clayton Acts. As plaintiffs point out, at one stage of the proceedings this defense was on their motion stricken. Defendants contend that subsequently the defense was reinstated and may be relied upon here. On this score the record abounds with confusion. One thing, however, emerges with certainty, that is, that the District Court did not rule on the merits of this defense and, therefore, did not rely upon it in allowing defendants' motion for summary judgment on counts 1 and 2. In view of our agreement with the District Court as to the other grounds upon which the motion for summary judgment was allowed, we, like that Court, find no occasion to decide defendants' contention in this respect.

We now come to count 3, which charges defendants with the violation of Sec. 2 of the Clayton Act, as amended by the Robinson-Patman Act (Sec. 13, Title 15 U.S.C.A.), by price and service discrimination against plaintiffs and in favor of other customers.

Defendants' motion for summary judgment as to this count stated:

"Any difference in price or service, as alleged in Count Three, between purchases by plaintiffs of Midas brand exhaust parts and purchases by other persons of Midas brand exhaust parts or International brand exhaust parts from defendants did not constitute a discrimination, in that:

(a) Plaintiffs did not compete with other purchasers of Midas brand exhaust parts;

(b) Plaintiffs had the ability and opportunity to purchase Midas brand exhaust parts or to purchase International brand exhaust parts;

(c) Retailers' and consumers' preference for the Midas brand exhaust parts system as a premium

commodity, its inseparable and distinct guarantee, and its different metallic properties made it unlike in grade and quality to the International brand exhaust system."

The District Court at the time it allowed summary judgment as to counts 1 and 2 denied such judgment as to count 3, without prejudice to the right of plaintiffs to obtain defendants' answers to certain interrogatories which they had proposed. After defendants had supplied the information thus sought, the Court allowed summary judgment as to this count.

We reach the conclusion that the allowance of summary judgment as to count 3 was improper. In doing so, we see no point in citing or discussing the numerous cases called to our attention. It is sufficient to refer to two recent decisions of this Court, cited and relied upon by defendants. *Crest Auto Supplies, Inc. v. Ero Mfg. Co.*, 360 F.2d 896; *Markwell v. General Tire and Rubber Co.*, 367 F.2d 748. In both cases summary judgments were affirmed. In *Crest*, as previously shown, the situation was similar to that here. In that case we affirmed summary judgment as to counts 1 and 2, based on the *pari delicto* defense. We affirmed summary judgment as to count 3, in the main for the reason that the complaint failed to allege that the practice complained of had any effect on competition. We also held that the affidavit filed in support of the motion was not controverted by counter-affidavit and there was thus no issue of material fact.

In *Markwell*, we sustained summary judgment on the premise that affidavits filed by the plaintiff in response to the motion for summary judgment failed to contradict those filed in support of the motion. In doing so we stated (page 750):

"As the Supreme Court's Advisory Committee stated, Rule 56 (e) was amended to require a party opposing a motion for summary judgment, supported by affidavits, to produce enough evidentiary matter to establish a genuine issue for trial, for the 'very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'"

The situation in the instant case is far different. The sole affidavit offered by defendants in support of summary judgment was, as previously noted, that of Nathan and Gordon Sherman. While this affidavit was pertinent to the defense of *pari delicto* interposed as to counts 1 and 2, it bears no relevancy to the count under consideration. It neither denies nor offers any explanation as to the discriminatory practices alleged in count 3. Obviously, it required no counter-affidavit. More than that, the voluminous record here contains deposition testimony, answers to interrogatories and much documentary evidence, from which we think clearly emerge genuine issues for trial.

The District Court held that there was no intra-brand discrimination, that is, sale of Midas parts to other Midas dealers at prices lower than those charged plaintiffs, on the ground that such parties were not in competition. However, the Court's finding that there was no competition among such dealers is based solely upon plaintiffs' deposition testimony "that the geographic 'marketing area' in which they sold Midas products was the 'city or county' in which each shop was located, and that no other Midas dealer was located within that region of competition." This geographical situation, while a factor to be considered, in our view does not eliminate the issue as to whether there was or might have been competition. Customers of Midas dealers might be located in areas between dealers and willing to patronize any of them.

More important, the Court embraced defendants' contention that there was no legal discrimination against plaintiffs because they had the ability and opportunity to purchase either Midas brand exhaust parts or International brand exhaust parts (inter-brand). Relative thereto, the Court found:

"* * * that plaintiffs, well aware of any price differentials that might exist between the two brands, having dealt with International previously, and in one instance having continued to do so, *freely* chose to forego purchases of International parts and to deal exclusively with Midas. * * * The evidence is uncontroverted in demonstrating that plaintiffs were

free to purchase either product, but chose Midas. No discrimination in a legal sense is present, and defendants are entitled to summary judgment."

We think this finding confuses the issue presented by count 3 with that which we have previously considered relative to counts 1 and 2. True, plaintiffs by their franchise agreement "freely chose to forego purchases of International parts and to deal exclusively with Midas." Thus, under the *pari delicto* doctrine, as we have held, they were precluded from complaining on that score. However, the fact that they were required to purchase from Midas at a price determined by it does not absolve Midas from the charge that it or International granted discriminations in prices and services to certain of their customers, without offering or otherwise making those same or similar services available to plaintiffs, as charged in count 3.

We think the finding, "The evidence is uncontroverted in demonstrating that plaintiffs were free to purchase either product, but chose Midas," is erroneous. Plaintiffs' freedom in this respect was forfeited by the terms of the franchise agreements. The record contains much evidence that there was a continuing effort on the part of Midas to enforce the exclusive dealer requirement.

A few excerpts from the record are sufficient to demonstrate at least that there was an issue as to whether plaintiffs were free to handle any product other than that purchased from Midas. On July 1, 1957, Gordon Sherman advised his "field counselors":

"THE MOST SACRED PRINCIPLE OF THE MIDAS PROGRAM IS THAT ALL MIDAS SHOPS ARE MUFFLER SPECIALISTS, AND NO SIDE LINES ARE PERMITTED IN SHOPS THAT IDENTIFY THEMSELVES WITH THE MIDAS PROGRAM.

• • • any merchandise not carrying the Midas brand. Our policy in this matter is simply one of requiring that those people who are part of the program are part of it all the way. • • • See to it that it is enforced and tell us where it isn't."

On March 31, 1958, Sherman in a memorandum to all "field counselors" stated in part:

"We now require that all Midas Muffler Shops purchase their Hollywood mufflers from Midas exclusively. This is somewhat overdue since the convention last year, and we have long since prepared our dealers to accept this line as part of their overall participation in the Midas program. Take it from there."

On March 25, 1959, Sherman advised his "field counselors" that the home office had "studied each and every Midas order" as it was processed for shipment in order to "isolate" those dealers who were not purchasing "tail pipes" from defendants. In this memorandum, Sherman reiterated defendants' exclusive dealing policy, stating:

"When a dealer signs a franchise with us he commits himself undeniably to certain basic practices in our program. Paramount among these is his consistent and exclusive purchase of our products. Our dealers have become so dedicated to our mufflers that I believe there is no question on this, but it is possible that some of them regard our tail pipes and our clamps as a kind of afterthought to which 'loyalty' does not apply. You have all been aware of this as you also have been aware of certain tail pipe companies who manufacture short lines of easily produced numbers at discount prices."

The deposition testimony of plaintiffs as well as their answers to interrogatories likewise raise an issue as to their freedom to purchase products other than Midas. Typical is the testimony of Skarupa as to a conversation with a "field counselor":

"Q. Do you recall the substance of that conversation?

A. Well, I had pointed out to him that I could buy pipes cheaper if I bought through Texas Tail pipe. I could save a considerable amount of money. I could save a considerable amount of money in the year's purchase.

Q. What was his reply?

A. Well, he explained to me that I should know by now that I wouldn't be able to purchase from outside sources because of the fact that I would get my franchise cancelled and he explained to me that others had their franchise cancelled from the purchase of outside products."

Further in response to defendants' motion for summary judgment, the District Court stated;

"Finally, we are convinced that the Midas parts were sufficiently dissimilar in grade and quality from International products so as to justify a price differential under the terms of Section 2 (a)."

In our view, this is another issue which cannot properly be determined on a motion for summary judgment. Certainly the Court's reference to "Midas parts" could not refer to items other than mufflers. There is evidence that tail pipes, exhaust pipes, clamps and other items sold by Midas were indistinguishable from similar items sold by International and by other parties. In fact, Gordon Sherman in his deposition admitted that exhaust pipes, tail pipes and clamps sold by Midas did not bear a trademark or trade name. Defendant Schroeder on interrogatory admitted as much: 1

"Q. Was the Midas name placed on any of these items by putting the item in a box with a Midas name on it or by attaching a tag with a piece of wire or string during any of the period 1955 through and including 1960?

A. Not to my knowledge."

Plaintiff Ross on deposition testified:

"We could see no purpose, really, in buying pipes of that kind from Midas. There was no quantity discount. There was no freight allowance except the freight allowance when we shipped in larger quantity. Then we got a lower rate.

"There was no insignia on the pipe. Certainly we wouldn't be confusing anybody by selling a pipe from Texas rather than a pipe sold to us by Midas."

Plaintiff Skarupa testified:

"A. I don't think we can ascribe the word 'Midas' to the tail pipes because they weren't identified as such and people didn't come in asking for Midas tailpipes. There was no guaranty on the tailpipes.

Q. They were not identified as 'Midas' on the boxes were they not?

A. No sir.

Q. They were not?

A. Sir?

Q. They were not?

A. Midas tailpipes were not identified as Midas tailpipes, as you are stating it.

Q. On the boxes in which they were shipped?

A. The tailpipes didn't come in boxes; they came in bundles.

Q. There was no identification of 'Midas' or anything on the bundles?

A. A packing slip which was tied with wire, but that wasn't affixed to the tailpipes."

The District Court further stated:

"In addition to an undisputed physical difference existing between the two mufflers after January 1, 1959, the uncontroverted facts clearly reveal that the Midas product included in its purchase price a unique life-time guarantee by the manufacturer, not attached to the International commodity. Such a guarantee, in the opinion of this Court, clearly justifies a differential in price, and with equal clarity, constitutes a dissimilarity in grade and quality."

This reasoning in part is beside the point. The physical difference in the two mufflers, after January 1, 1959, is immaterial. Plaintiffs on brief make this clear. They state:

"After January 1, 1959, International Parts changed the gauge of steel used in the manufacture of the Midas muffler. Appellees used this change to justify the differential in their guarantee. Appellants' claim, however, is not based on the post-1959 muffler; rather, appellants' claim is based solely on the pre-1959 mufflers which were returned after January 1, 1959, and

which were identical to mufflers returned by their competitors who received a rebate of 100%; appellants received a rebate of only 50%."

There is evidence that there was no physical difference between the mufflers sold by International and those sold by Midas, except for the identification brand, for the years 1955 to 1959, inclusive. This was admitted in the deposition testimony of defendant Schroeder,

It is undisputed, as the District Court points out, that the Midas muffler carried a guarantee good at any Midas muffler dealer wherever located, while the International muffler carried a guarantee good only where purchased. We do not agree, however, that this difference constitutes a "dissimilarity in grade and quality" or that it justifies a difference in price.

We think the rationale employed in *Federal Trade Commission v. Borden Co.*, 383 U.S. 637, is applicable. The Court held, as stated in a headnote (page 637):

"Labels do not differentiate products for the purpose of determining grade or quality under Sec. 2 (a) of the Act, even though one label may have more customer appeal and command a higher price in the marketplace."

Paraphrasing this language, the Midas trade name or trademark does not differentiate its mufflers for the purpose of determining grade or quality, even though its guarantee may have more customer appeal and command a higher price in the marketplace.

Nothing we have said is to be taken as a resolution of any issue of fact. Our sketchy review of the evidence is only for the purpose of showing that there are genuine issues of fact which preclude the disposition of count '3 by summary judgment.

The summary judgment as it relates to counts 1 and 2 of the complaint is affirmed. The summary judgment as to count 3 is reversed and the cause therein stated is remanded for further proceedings.

AFFIRMED IN PART AND REVERSED IN PART.

CUMMINGS, *Circuit Judge* (dissenting in part). I agree with the majority that *Crest Auto Supplies, Inc. v. Ero Manufacturing Company*, 360 F.2d 896 (7th Cir. 1966) supports the *in pari delicto* defense to Counts 1 and 2. However, an examination of the briefs filed in *Crest* reveals that *Simpson v. Union Oil Co.*, 377 U.S. 13, was not cited to this Court. A close study of the *Simpson* case, including the briefs filed therein, convinces me that the Supreme Court would not accept the *in pari delicto* defense here. As with these plaintiffs, *Simpson* had freedom of choice "to accept or reject the tendered lease and consignment contract. The record shows that he went into this deal with his eyes open and knew all the facts." He "deliberately and knowingly enter[ed] into [the] contractual obligations" (311 F.2d 764, 768, 769). In *Simpson*, the Ninth Circuit used the *in pari delicto* theory to deny him any recovery. That point was fully briefed in the Supreme Court, which reversed, permitting *Simpson* to prevail. Therefore, I am forced to conclude that the Supreme Court rejected the *in pari delicto* defense. Judge McLean came to the same conclusion in *Lyons v. Westinghouse Electric Corporation*, 235 F.Supp. 526, 537 (S.D.N.Y. 1964), stating:

"It may be noted that under *Simpson v. Union Oil Co.*, supra, the fact that plaintiffs voluntarily entered into an illegal contract does not in itself bar their recovery. The contract, if illegal, is still an actionable wrong."

In *Simpson*, even Mr. Justice Stewart's dissent agreed that the *in pari delicto* reasoning of the Ninth Circuit was "untenable" (377 U.S. at p. 25). As in *Simpson*, these defendants had the coercive power to terminate plaintiffs'

¹ Professor Day interprets the *Simpson* case in accordance with Judge McLean's opinion. See 25 ABA Antitrust Section 240 (1964). Other cases disapproving the *in pari delicto* defense in certain situations include *Waldron v. British Petroleum Co.*, 231 F.Supp. 72, 91-92 (S.D.N.Y. 1964) and *Mason City Tent & Awning Company v. Clapper*, 144 F.Supp. 754, 769-770 (W.D.Mo. 1956). With respect to *Bales v. Kansas City Star Co.*, 336 F.2d 439, 444 (8th Cir. 1964), discussed at pp. 11-12, supra, these plaintiffs also seem to have "accepted the contract restriction only in business necessity" and not in an effort to help Midas violate the anti-trust laws, so that the *in pari delicto* defense would be inapplicable to them under *Bales*. Cf. *Englander Motors, Inc. v. Ford Motor Company*, 267 F.2d 11 (6th Cir. 1959); *Alles Corporation v. Senco Products, Inc.*, 329 F.2d 567 (6th Cir. 1964).

franchises if plaintiffs did not adhere to the resale price maintenance and exclusive dealing provisions. These plaintiffs wished to buy various parts (tailpipes, clamps, etc.) from competitors of Midas who were selling at lower prices than Midas. If they had been permitted to purchase at these lower prices, they would have been able to lower their prices, as did Simpson.

As stated in *Simpson* (377 U.S. at pp. 16, 17, 18):

"The fact that a retailer can refuse to deal does not give the supplier immunity if the arrangement is one of those schemes condemned by the antitrust laws.

. . .

"The exclusive requirements contracts struck down in *Standard Oil Co. v. United States*, 337 U.S. 293, were not saved because dealers need not have agreed to them, but could have gone elsewhere.

. . .

"The interests of the Government also frequently override agreements that private parties make. Here we have an antitrust policy expressed in Acts of Congress. Accordingly, a consignment [here a franchise agreement], no matter how lawful it might be as a matter of private contract law, must give way before the federal antitrust policy. . . . Nor does § 1 of the Sherman Act tolerate agreements for resale price maintenance."

The public policy justifying the denial of an *in pari delicto* defense in a case of this sort was stated as follows with reference to the unclean hands defense raised in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214:

"If petitioner and others were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the Government or by injured private persons. The alleged illegal conduct of petitioner, however, could not legalize the unlawful combination by respondents

nor immunize them against liability to those they injured."²

With respect to the majority's alternative basis discussed at p. 13 *supra*, this record shows that Midas and International held themselves out as separate and "divorced". Therefore, *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, does not permit defendants to claim that as a single business entity they were unable to conspire. Furthermore, under *Simpson v. Union Oil Co.*, 377 U.S. 13, and *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, a conspiracy is not needed to support Count 1.

As to the muffler part of Count 3, defendants have not cited any authorities or legislative history to show that the difference in the Midas and International guarantees makes these physically identical mufflers' dissimilar in grade and quality within the meaning of Section 2(a) of the Robinson-Patman Act. Cf. *Federal Trade Commission v. Borden Co.*, 383 U.S. 637, with the District Court's opinion herein (1966 CCH Trade Cases at p. 82,710). Therefore, affirmance on this point is not justified.

Except as indicated, I concur in the opinion of the Court.

A true Copy:

Teste:

.....
Clerk of the United States Court of
Appeals for the Seventh Circuit.

² See also *Budget Dress Corp. v. International Ladies' Garment Workers' Union*, 25 FRD 506, 508, 509 (S.D.N.Y. 1959); *Trebuhs Realty Co. v. News Syndicate Co.*, 107 F.Supp. 595, 599 (S.D.N.Y. 1952).

³ A different gauge of steel was used in the Midas muffler after January 1, 1959, but plaintiffs have limited their claim to pre-1959 mufflers.

